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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF OHIO
3 EASTERN DIVISION
4 LOCAL 17 INTERNATIONAL ASSOC. OF)
5 BRIDGE & IRON WORKERS INS. FUND,)
6)
7 Plaintiff,)
8) Civil
9 Action No.)
10 vs.)
11 1:97CV1422)
12)
13 PHILIP MORRIS, INC, ET AL,) Akron,
14 Ohio)
15)
16 Defendants.) VOLUME
17 4 - - -
18 TRANSCRIPT OF JURY TRIAL HAD BEFORE
19 THE HONORABLE JAMES S. GWIN, JUDGE
20 OF SAID COURT, ON THURSDAY, FEBRUARY 25,
21 1999)
22 AT 8:00 O'CLOCK A.M.
23 - - -
24 11 APPEARANCES:
25 12 For Plaintiffs: PATRICK J. COUGHLIN, ESQ.
26 JOHN MONROE, ESQ.
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45 22 For Philip Morris, Inc: BRADLEY E. LERMAN, ESQ.
46 23 GEORGE LOMBARDI, ESQ.
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1006

1 For Lorillard Tobacco Co: GARY R. LONG, ESQ.
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For RJR Nabisco, Inc,: ROBERT C. WEBER, ESQ.
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1007
issue. 1 MR. LERMAN: Your Honor, I have one
indication that 2 THE COURT: There has been an
3 there is some witness or some issue with regard
to the 4 first witness, Mr. LeBow.
5 MR. BERNICK: Yes, this is the same
issue we 6 discussed briefly yesterday afternoon. It
concerns 7 whether Mr. LeBow --
8 MR. WEBER: David, he's in the
courtroom. 9 MR. COUGHLIN: I actually think,
your Honor, 10 this is not really, my witness so to speak. I
just met 11 Mr. LeBow last night. We entered into a
settlement. If 12 there is some instruction Mr. LeBow should talk
about, the 13 court should do it.
14 MR. BERNICK: That's what I'm
asking.

15 MR. COUGHLIN: We should have Mr.
LeBow come
16 up.
17 MR. BERNICK: The issue is whether
he should be
18 permitted to testify concerning not his own
settlement
19 with the AG's but the settlement to the other
defendants
20 with the AG.
21 THE COURT: I don't know it's going
to be
22 relevant. So, why don't you stay away from
that.
23 MR. COUGHLIN: I'll tell you what.
I just met
24 Mr. LeBow last night, and I didn't go through
questions.
25 THE COURT: Just be careful. I
don't know that

1008
1 might be relevant in this case.
2 MR. COUGHLIN: He might say it.
3 THE COURT: Just continue in the
area you ask
4 inquiry. And if he goes beyond the scope of
questioning,
5 I will ask the jury to disregard it. But, as
we sit here
6 today, I don't see how it would be relevant.
7 MR. COUGHLIN: I think it is
relevant, your
8 Honor, into why he settled and things that he
did when he
9 did. And I think he might say something about
it.
10 THE COURT: Let's just see where the
lines of
11 the questioning go. You stay away from it
though until
12 you get into a question.
13 MR. BERNICK: Last night at 10:00
o'clock at
14 night we received a new list of supplemental
designations
15 for Mr. LeBow. We are able to deal with it. I
apologize
16 to the court, we don't have in nice binders for
the court
17 in which to respond. I wanted to make the
court aware of
18 that.
19 THE COURT: Okay, if the jury will
please be
20 seated. I'll ask the Plaintiff's to call your
next
21 witness.
22 MR. COUGHLIN: Your Honor, the
plaintiffs would
23 call Mr. Bennett LeBow.
24 And, ladies and gentlemen of the
jury, I would

25 like to introduce the last partner of mine I
will

1009

1 introduce. This is Steve Crandall, an
associate of mine.

2 And we have been together for about 20 years,
and he will

3 be doing the witness this morning.

4 THE COURT: I didn't know you were
that old,

5 Mr. Coughlin.

6 MR. COUGHLIN: Well, we started on a
basketball

7 team together.

8 BENNETT S. LEBOW

9 called as a witness by and on behalf of the
Plaintiff,

10 being first duly sworn, was examined and
testified as

11 follows:

12 THE COURT: If you will state your
name and if

13 you will spell your last name for us.

14 A. My name is Bennett S. LeBow L-E capital
B-O-W.

15 THE COURT: Mr. Coughlin.

16 DIRECT EXAMINATION

17 BY MR. COUGHLIN:

18 Q. Mr. LeBow, where are you from?

19 A. I live in Miami, Florida.

20 Q. And what is your relationship to the
Liggett Tobacco

21 Company?

22 A. I'm Chairman and CEO of Brooke Group which
owns a

23 hundred percent of Liggett Group.

24 Q. Does that mean that you effectively
control Liggett?

25 A. That's correct.

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1 Q. Is that a publicly traded company?

2 A. Brooke Group is; Liggett is not.

3 Q. And as a majority shareholder you control
the

4 policies and procedures of Brooke Group?

5 A. That's correct.

6 Q. When did you acquire Liggett?

7 A. Brooke Group acquired it in October of
1986.

8 Q. Had you always wanted to get into the
tobacco

9 business?

10 A. No, it was just a financial opportunity
that came

11 along at the time.

12 Q. What was your involvement in running the
Liggett

13 Tobacco Company, day-to-day?

14 A. I was not involved at all in the managing
it on a

15 day-to-day basis.

16 Q. Who informed you about the running of the
company?

17 A. Whoever was the President of the company
at the time.

18 We had occasionally meetings, quarterly
meetings, discussed

19 the operation.

20 Q. And did you, when you bought the company,
did you

21 keep the staff that had been at Liggett on?

22 A. I kept them on for about, I think, about
six years,

23 five, six years, and the new presidents came in
over the

24 past few years.

25 Q. Are you married, Mr. LeBow?

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1 A. Yes, I am.

2 Q. Do you have any children?

3 A. I have 2 children and 5 grandchildren.

4 Q. And could you describe your education?

5 A. I have a bachelors degree in electrical
engineering.

6 A year of graduate school, and that's it.

7 Q. And what did you do after you finished
college?

8 A. I went in the army, to the Pentagon for 2
years and

9 stayed an additional 3 years in the Pentagon for
an

10 additional three years for the army.

11 Q. What were you doing in the army?

12 A. I was responsible in the 60's for the
army's computer

13 systems working for the Vice Chief of Staff for
the army.

14 Q. What was, what were the brands that
Liggett were

15 selling in 1986 when you took over the company?

16 A. Four primary brands. L&M, Chesterfield,
Lark and

17 Eve.

18 Q. I would ask you to take a look at those
two packs of

19 cigarettes. Plaintiff's Demonstrative 89 and
88. If you

20 could hold those up and show them to the jury.
Thank you.

21 Have you ever smoked, Mr. LeBow?

22 A. 30 years ago I did. I stopped about 30
years ago.

23 Q. And how did you stop?

24 A. Pretty much over an agonizing 6 to 8
weeks, cold

25 turkey, just stopped it was, very agonizing
getting it off,

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1 8 weeks, maybe a little longer.

2 Q. Anybody else in your family smoke?

3 A. My wife smokes, until a couple months ago.

Until I

4 beat her up to stop. She has stopped about 20
times. She
5 occasionally stopped, but.
6 Q. What caused you to stop smoking?
7 A. The health warnings in 1969 that were
coming out. I
8 went and took a course at a hospital. And it
kind of
9 scared you, showing you the horrible things
about smoking.
10 Q. When you purchased Liggett from 1986 did
you give any
11 thought at that time whether cigarettes were
addictive?
12 A. At that time lawsuits, some lawsuits were
going on.
13 Everyone assured me there was no problem. They
said don't
14 worry about the lawsuit. The tobacco companies
hadn't paid
15 a dollar.
16 Q. Who gave you that advice?
17 A. Various lawyers that we had hired in the
company and
18 sellers and a lot of advisors.
19 THE COURT: Mr. LeBow, the court
reporter, if
20 we could just slow it down just a bit, Mr.
Coughlin.
21 BY MR. COUGHLIN:
22 Q. So, you knew about various lawsuits
against the
23 company?
24 A. In 1986 there were a few, just a few, a
few meaning
25 under 10 or something like that, 10 or 20.

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became
1 Q. And did there ever come a time when you
2 involved in those lawsuits?
3 A. Yeah, later on, 10, 12 years later, 10
years, later,
4 9, 10 years later.
5 Q. Do you ever remember testifying in the
Brown case?
6 A. Yes, I had. I had a deposition, I think,
in 1993.
7 Q. And at that deposition, what did you say
about
8 addiction?
9 A. They asked me at the time did I think
smoking was
10 addicted. And I said no, because I just didn't
know. I
11 had known at the time a lot of people who quit.
So people
12 can quit. So, I as a layman didn't really know
the answer,
13 but I said no.
14 Q. Did you, did you talk about causation of
disease?
15 A. I believe I said, at the time, that I just

didn't

16 know anything about it, whether the party line,
which if I
17 could use those words was, that it's never been
proven so
18 why even, you know, admit to anything.
19 Q. And who was giving you that information?
20 A. Again, the attorneys, my attorneys,
Liggett's
21 attorneys. We had a group of attorneys who had
specialized
22 in tobacco litigation for 20 years, 30 years,
same group,
23 they kind of advised me what the party line was.
24 Q. Did they show you internal documents?
25 MR. BERNICK: Your Honor, I would
object and

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1 move to strike the last portions of the
statement to the
2 extent the witness is testifying about the
substance of
3 what his counsel told him. That's hearsay.
4 THE COURT: It's not offered, as I
hear it,
5 it's not being offered for the truth of
assertion. It's
6 not being offered for the truth of the
assertion that it's
7 not addictive. So, it would not be an out of
court
8 statement offered for the truth of the
assertion. And it
9 would not be hearsay.
10 MR. BERNICK: I just take a proffer.
11 THE COURT: So, I'll overrule the
objection.
12 BY MR. COUGHLIN:
13 Q. During this period of time did you ever
hear of the
14 Tobacco Institute?
15 A. Yes; I heard of it.
16 Q. Was Liggett a member?
17 A. I think they were, they may have just quit
right
18 around that period of time. There was some
institute that
19 I, I told everybody why are you bothering with
this; why
20 are you, are we paying money. Let's get out of
it.
21 Q. Were you paying dues?
22 A. There was some institute or some Tobacco
Institute we
23 were paying some dues to, yes.
24 Q. Now, when was the first -- so, you were
first, was
25 that the first time you were deposed about
smoking and

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1 health issues was that Brown case in Florida in

1993?

2 A. That's correct.

involved 3 Q. And is there another time when you became
4 with the issues of addiction and causation with
5 Mr. Horrigan?

at all. He 6 A. No, I really didn't get involved with him
7 I think in 1994 or '95, I think it was '94, went
8 Congress to testify. And he did that pretty
much on his

9 own. I had no involvement with him.

10 Q. Who was Mr. Horrigan?

Tobacco for 11 A. He was formerly the President of RJR

about a year 12 many, many years. And Liggett hired him for

and I 13 to work for us, 9, 10 months. He worked for us,
14 fired him.

went and 15 Q. While he was working for you is when he
16 testified in front of Congress?

17 A. That's correct.

in front of 18 Q. Did you know that he was going to testify
19 Congress?

saw him 20 A. The day before he told me, day before I

told me he was 21 practicing what he was going to say. And he
22 going before Congress. That's all I knew about
it.

going to say 23 Q. Did you talk to him about what he was

24 about causation of disease or addiction?

25 A. No, not at all.

1016

in 1994? 1 Q. Did you go to the congressional hearings

2 A. No, I did not.

3 Q. Did you see them at any time?

them in 4 A. I saw reruns or something. I didn't watch
5 detail.

your 6 Q. And what -- did you know the position that
7 company was taking at those hearings?

knew it 8 A. Not from the hearings, no. I obviously
9 after, after they took it.

10 Q. And what were those positions?

company, or on 11 A. Mr. Horrigan got up on behalf of the

12 behalf of himself, and said he believed --

object to 13 MR. BERNICK: Your Honor, again I

an out of 14 this answer to the extent he is simply reciting

party to this 15 court statement made by a person who's not a

16 case.
17 THE COURT: Again, I don't think
it's offered
18 for the truth of the statement. So it would
not be
19 hearsay. It's offered for the fact that Mr.
Horrigan made
20 the statement to Congress, which is not
hearsay. So, I'll
21 overrule the objection.
22 MR. COUGHLIN: Okay.
23 THE WITNESS: Would you repeat the
question.
24 BY MR. COUGHLIN:
25 Q. So what's the position that Liggett the
company that

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1 Brooke Group owned was taking as to addiction
and
2 causation?
3 A. Mr. Horrigan got up with all the other
tobacco
4 executives, and said that he did not believe
that smoking
5 was addictive.
6 Q. Some time after this, in 1995, did you
begin focusing
7 on the smoking and health problem?
8 A. Yes, I did.
9 Q. Why did you do it then?
10 A. This same group of lawyers that the
company had had
11 for about 10 or 15, 20 years -- many years --
came to me.
12 And the law firm they were in was breaking up.
And they
13 wanted to go to another law firm and wanted as a
group,
14 wanted to go to another law firm and take all
the tobacco
15 litigation with them.
16 So, they called me up and asked my
permission
17 if they can go to this other law firm, to some
other
18 lawyers. I said, you know what, I would rather
you go to
19 a different law firm where I know the person.
Why don't
20 you go to their other law firm where I know the
senior
21 partner, and maybe I'll start to focus on these
things a
22 little bit better.
23 They call me back the next day and
say if I let
24 them go to the law firm they wanted to go to
Philip Morris
25 would pay, would pay all the legal fees.

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1 Q. Was that very stunning?

2 A. That's very stunning -- which at the time
was running
3 8 to 10 million dollars a year. Philip Morris
one of our
4 major competitors, wants to pay my legal fees.
That got
5 some bells ringing in my head, said what's going
on here.

6 Q. What did you do?

7 A. I said for the time being I said, okay,
let's see
8 what happens. And I accepted the offer for a
few months.
9 Philip Morris started paying my legal fees. But
I really

10 started thinking something's wrong here.

11 Why would Philip Morris want to pay
my legal
12 fees when for forty years I've been told by all
the
13 lawyers involved there is no problem; there is
no

14 litigation; we win everything. Tobacco

companies have
15 never paid a penny.

16 Then, in addition, at this time I
was involved

17 with stockholders on, and in trying to force

RJR Tobacco

18 to split up the company into the food company

and tobacco

19 company, which we won, the first vote of which

we won --

20 the stockholders and I won.

21 Q. The stockholders of who?

22 A. RJR.

23 Q. You had an interest in RJR?

24 A. I had a minority interest in RJR. And we

had a vote

25 to try to force management to split up the
company, and we

1019

1 won the first vote.

2 Q. And why were you trying to split up that
company?

3 A. To get the stock price up just to make
money.

4 Q. The stock price of --

5 A. RJR. The management of RJR came out
publicly saying

6 we can't do this, even though the shareholders
want it we

7 can't do it because there is too much tobacco
litigation.

8 Q. And what was your response to that?

9 A. I said what tobacco litigation?

10 MR. WEBER: Your Honor, I object to
statements

11 about what RJR management said his
characterization,

12 that's clear hearsay.

13 THE COURT: Again, I'm not sure it's

offered
14 for the truth. So, I don't find it to be
hearsay, and
15 I'll overrule it.
16 MR. WEBER: Could I ask for an
instruction to
17 the jury.
18 THE COURT: You can consider the
idea hearsay
19 out of court statement is not offered for the
truth of the
20 statement. I have ruled and I instruct you
that these out
21 of court statements are not to be considered
for the truth
22 of the statement. And, in other words, that he
gave the
23 testimony that RJR executives said there is too
much
24 tobacco litigation.
25 You are not to consider his out of
court, this

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1 out of court statement for the truth of whether
there was
2 too much out of court tobacco litigation or not
too much.
3 But you can't consider their
statement for the,
4 for his shareholders action against RJR or his
5 participation in the shareholders action
against RJR
6 seeking to have RJR split the tobacco business
from the
7 non-tobacco business of RJR, or actually that
business, so
8 as I understand it.
9 So, go on to the next question. You
can
10 consider it for what happened with regard to
that, but not
11 consider it for the truth of the assertion that
there is
12 too much tobacco litigation, the statement he
purports
13 that RJR made -- or their executives made.
14 BY MR. COUGHLIN:
15 Q. Now, your attempt to split up RJR got
pronounced,
16 didn't it?
17 A. Yes, it did. But I said to myself, I said
my God I
18 got Philip Morris paying my legal fees. I have
RJR number
19 2 company in the country saying there's too much
tobacco
20 litigation.
21 Q. How big was Liggett compared to RJR and
Philip
22 Morris?
23 A. Philip Morris has about 50 percent of the
market.

24 RJR has 25 percent of the market, and Liggett
has 2 percent
25 or less than 2 percent today.

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1 Q. And what did you do next?
2 A. I then, as I say, told everybody when with
these
3 things happened, I believe I smelled a rat.
Something was
4 wrong. I was not being told the truth by my own
lawyers at
5 this point.
6 I just didn't know what was going
on. I got
7 Philip Morris paying my legal fees. I've got
RJR saying
8 there is too much tobacco litigation. So, I
smelled
9 something was really wrong.
10 Q. Was that the first time you became
concerned, really
11 concerned about the litigation and potential
liability?
12 A. That was the first time I really felt
something was
13 not being told truthfully, and I had the gut
feeling and
14 wanted to pursue it and get to the truth of the
matter.
15 Q. Is that the first time you focused on the
smoking and
16 health issue?
17 A. That was the first time I focused on it,
yes.
18 Q. What action did you take?
19 A. I went in secret and hired the other law
firm. I
20 wanted the other lawyers to go to -- they
refused to go to.
21 And we started secret negotiations at the time
with the
22 attorneys general of the United States who were
suing the
23 tobacco industry and various plaintiff attorneys
who had
24 some class action going against the tobacco
industry.
25 Q. So, you sent these attorneys to the
attorney generals

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1 that were suing?
2 A. That's correct, right.
3 Q. And there was a big class action with the
Constano
4 group?
5 A. That's correct.
6 Q. And you sent this law firm to go talk to
them?
7 A. Yes.
8 Q. And did you ask them to get the facts from
them?

9 A. I asked them to set up meetings, because
the quickest
10 way to find out what's going on was to talk to
the other
11 side.
12 And to my knowledge this was the
first time any
13 tobacco executive talked to the other side,
which I didn't
14 understand. Why don't you talk to these
people, find out
15 what's going on, what's their case, what are
they trying
16 to accomplish.
17 Q. Did you tell anybody else in the tobacco
industry,
18 Philip Morris, RJR, any other companies you were
going to
19 do that?
20 A. Absolutely not. I didn't even tell my own
lawyers,
21 because my own lawyers were being paid by Philip
Morris.
22 The only one I told was the president of
Liggett. At the
23 time I didn't even trust the lawyers inside
Liggett.
24 Q. And who was the President of Liggett at
that time?
25 A. A man by the name of Reubin Chakala. I
can't, don't

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1 ask me to spell it. I don't know if I can.
2 Q. And did your lawyers go meet with the
Attorneys
3 General in this plaintiff's group?
4 A. Yes, I did, and they did, and so did I.
5 Q. You went along?
6 A. On some of the meetings, yes.
7 Q. What did you learn?
8 A. I learned there were some serious issues
here. The
9 issue of addiction primarily no one was ever
warned about
10 addiction. The packages have all these health
warnings on
11 them, but there is nothing that says smoking is
addictive,
12 never has been. Sounds like a serious fault
from my point
13 of view.
14 Q. Did you ask your attorneys to investigate?
15 A. Well, yes, I asked them just -- no, I
asked them to
16 negotiate. We couldn't do much investigation
because I
17 didn't want anybody else in the industry to know
at the
18 time.
19 Q. Okay. And did they negotiate a deal?
20 A. Yes, we did. In March of 1996 we
negotiated a

class 21 settlement with five Attorneys General and the
22 actions Castano class action.
23 Q. And what did that settlement entail, just
in general 24 terms?
25 A. In general terms it entailed Liggett to
pay so much

1024
1 money, a percentage of earnings to attorneys,
class and 2 Attorneys General, and agree to certain other
things, agree 3 to certain FDA health type procedures.
4 Q. You mean regulations by the FDA?
5 A. Yes, regulations by the FDA and other
things at the 6 time.
7 Q. Did you agree to turn over your company
documents at 8 the time?
9 A. No, I hadn't seen the documents. I hadn't
seen 10 anything. They were still in the hands of my
long time 11 attorneys.
12 Q. And so how did you inform them you had
reached a 13 settlement with the attorneys general?
14 A. It appeared in the Wall Street Journal in
the middle 15 of the week. Everybody in the industry went
crazy. 16 Everybody on Wall Street went crazy at me,
saying what are 17 you doing; how could you do this, et cetera, et
cetera. 18 I honestly felt in my gut I was
doing the right 19 thing. And a few days later all of my
attorneys fired me. 20 Q. They fired you before you fired them?
21 A. Absolutely, they beat me to the punch,
right. 22 Q. Were you going to fire them?
23 A. Absolutely.
24 Q. Okay. But you got fired first?
25 A. I got fired first.

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1 Q. Okay. And then what did you do?
2 A. Then I told the new lawyers, I said, I
want to see 3 these documents which I have never seen. They
are always 4 in the hands of the old attorneys. And my new
attorneys 5 finally got our hands on these documents, our
documents. 6 They spent about six months
analyzing them -- 7 and there are thousands and thousands of

documents --

8 going through them. And they came to me and
said, Ben,
9 there are some very serious, serious things in
these
10 documents.

11 Q. And what they did, they not only looked at
your

12 company's documents; is that right?

13 A. Correct.

14 Q. They also looked at documents that the
Attorneys

15 General had been able to get a hold of?

16 A. They looked at everything, everything we
could find,

17 a lot of joint defense, called joint defense
documents, and

18 our documents, and documents which had been
released so

19 far, et cetera.

20 Q. Did they come to, did you talk to them
about disease

21 causation?

22 A. Well, they came to me and said some of
these

23 documents don't purport to agree with what the
industry has

24 been saying for years. That there is issues in
some of

25 these documents admitting that smoking is
addictive and so

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1 forth.

2 MR. BERNICK: Your Honor, again I
don't think

3 it is clear that the proffer is not for the
truth of the

4 matter asserted.

5 THE COURT: Are you making an
objection?

6 MR. BERNICK: I'm making an
objection.

7 THE COURT: I'll sustain it to that
last remark

8 in terms of these out of court remarks made by
these

9 attorneys to this witness on that occasion.
So, disregard

10 the last portion of Mr. LeBow's response
wherein he said

11 that these attorneys told him there were issues
that these

12 documents admitted that smoking is addictive.

13 BY MR. COUGHLIN:

14 Q. Mr. LeBow, after you got this information
from your

15 attorneys, what did you and Liggett determine?

16 A. We determined to sit down with -- at the
time there

17 were many additional states filing lawsuits,
Attorneys

18 General filing lawsuits. We sat down with an

additional, I
19 believe it was, 20 some odd states and
negotiated a new
20 settlement which called for us to pay additional
monies and
21 to release all these documents to the public.
22 Q. And did you do that?
23 A. We did that, and we also released, we also
admitted
24 at the time, which we agreed to now also, or
feel now, that
25 smoking is addictive; smoking does cause all
these

1027
1 problems, et cetera, et cetera.
2 We released most of the documents,
you know,
3 immediately upon signing the settlement. The
industry ran
4 into court in North Carolina trying to block
certain
5 documents from being released. And, over time,
6 fortunately, I think most of them have been
released by
7 now.
8 Q. So, you admitted that smoking causes --
your company
9 admits that smoking causes lung cancer?
10 A. That's right.
11 Q. Emphysema?
12 A. That's right.
13 Q. Heart disease?
14 A. Right.
15 Q. You admitted that cigarettes were
addictive?
16 A. That's right.
17 Q. And did you change something on the
warning labels?
18 A. Yes. We also agreed to put on every one
of our
19 packets finally the warning that smoking is
addictive.
20 Q. And did you put it on from the Surgeon
General?
21 A. No, from us. Just our own warning, you
know,
22 caution, smoking is addictive.
23 Q. So, is that the first time to your
knowledge one of
24 the big tobacco companies in this country had
admitted it
25 from itself?

1028
1 A. That's correct.
2 Q. And there are those warnings on those 2
packets that
3 you have?
4 A. Yes.
5 MR. COUGHLIN: I would like
permission to pass
6 those to the jury, your Honor.

7 THE COURT: You can move their
admission later.
8 BY MR. COUGHLIN:
9 Q. Let me ask you to take a look at a few
documents, Mr.
10 LeBow. When you went through, if I could have
Exhibit 15.
11 You have got a binder in front of you with some
of the
12 documents.
13 If you could flip open to that
binder, that's
14 the first page. This is a 1953 memo from Hill
& Knowlton.
15 Do you know who Hill & Knowlton is?
16 A. No, I do not.
17 Q. Okay. Do you know?
18 A. Oh, I'm sorry, Hill & Knowlton, yeah; I
know who
19 they are.
20 Q. Okay. Had you heard what had prompted,
had you ever
21 heard anything about the industry getting
together in 1953?
22 A. No; I never heard anything.
23 Q. Okay. You never heard anything like that
after you
24 had taken over the Liggett Tobacco Company; is
that right?
25 A. No, I never would have asked the question.

1029

1 Q. Did anybody tell you?
2 A. No.
3 Q. Okay. Let me put, let me have you focus
on the
4 paragraph if the middle there. And it talks
about this is
5 of course the most challenging problem our
organization has
6 ever faced and perhaps the most challenging
problem that
7 ever faced a great industry, one with annual
sales of
8 almost 5 billion at retail and with economic
roots that
9 reach clear back to the farm.
10 Do you see that?
11 A. Yes, I do.
12 Q. Let me ask you to flip into the next page?
13 THE COURT: There is a monitor to
your right.
14 Q. It might be easier?
15 Either way, you can focus on that if
you were
16 having some problem with that.
17 THE WITNESS: This is fine here.
18 BY MR. COUGHLIN:
19 Q. It talks about in 1953 the attitude of the
men, and
20 it talks about in the middle of that paragraph
one of the
21 men said it was fortunate for us that cigarettes

are a

22 habit they can't break. Did anybody tell you
that when you
23 had taken over?
24 A. No.
25 MR. BERNICK: Your Honor, I would
object to

1030

1 that question and this line of questioning.
This witness
2 is not established to have any foundation to
testify
3 concerning these documents. And all that is
really taking
4 place, counsel is displaying documents yet
again and
5 having the witness say have you seen it or not.
6 We can go endlessly through
documents on that
7 basis. He's not speaking from any personal
knowledge. I
8 object to this line of questioning.
9 THE COURT: The documents are
ancient records.
10 So, they come in arguably without a hearsay
objection.
11 But I'm not sure in terms that you haven't gone
over this
12 ground.
13 MR. COUGHLIN: I'm going to be very
brief, just
14 to establish some basic belief, your Honor.
15 THE COURT: Well, I guess the point
I'm going
16 to, haven't you covered this ground that no one
told him
17 about this at the time he purchased the
company?
18 MR. COUGHLIN: I did, I thought.
19 THE COURT: Why are we going over it
again
20 then?
21 MR. COUGHLIN: I thought I would go
through
22 some of the documents he had never seen, but
confirm this
23 and --
24 THE COURT: Okay. I think he's
already
25 testified generally he didn't know any of this.
And I

1031

1 think he's given the outlines of his
investigation. I
2 don't think it's necessary. I think it's
cumulative, the
3 testimony.
4 BY MR. COUGHLIN:
5 Q. That's fine, your Honor. If we could to
go the next
6 document, Exhibit 41, if we could take a look at

a blow up
can show
the same
the jury in
participation at
1963.
since 1986.
he still had
we aren't
through
I think
look at that
about, it's
And it
participants

7 of that paragraph that's highlighted, I think I
8 how this is relevant?
9 MR. BERNICK: Your Honor, this is
10 problem. This document has also been shown to
11 connection with Dr. Jaffe's testimony.
12 MR. COUGHLIN: It was, and it deals
13 specifically with Liggett and Liggett's
14 which point we believe the collusion started in
15 MR. WEBER: He only owned Liggett
16 THE COURT: I understand that, but
17 control of the records. I'll allow this, but
18 going through all these exhibits we have been
19 before. I'll allow you to do it this time, but
20 otherwise it's too cumulative.
21 BY MR. COUGHLIN:
22 Q. I understand, your Honor. If you take a
23 paragraph that's highlighted in there, it talks
24 a December 15th, 1953 Hill & Knowlton document.
25 talks about where I wanted to go was on the

1032
group; do
Reynolds, Philip
Company, Brown
public
see that?
Liggett and
participating in
Myers did not
then.
statement, Exhibit
15?

1 and who are, who the participants were in that
2 you see that?
3 A. Yes.
4 Q. The American Tobacco Company, R.J.
5 Morris, Benson and Hedges, the U.S. Tobacco
6 & Williamson have agreed to go along with a
7 relations program on the health issue; do you
8 A. Yes, I do.
9 Q. Next line talks about Liggett and Myers,
10 Myers. It says Liggett and Myers is not
11 that organization; do you see that?
12 A. Yes, I do.
13 Q. Did anyone talk to you why Liggett and
14 participate in that organization at that time?
15 A. Again, it was 1953. I wasn't involved
16 Q. Did you ever hear about the Frank
17 15?

18 A. I've heard about it, yes.
19 Q. You have heard about it since you reviewed
the facts;
20 is that right?
21 A. That's correct.
22 Q. Could I flip into the next chart next.
23 Did you hear about the promises that
the
24 industry made that they accepted an interest in
people's
25 health as a basic responsibility paramount to
every other

1033
1 consideration or business? Did you know the
industry made
2 that response in 1953?
3 A. I just learned about it in the past couple
years,
4 yes.
5 Q. Let's flip on to the next document next.
Do you see
6 this here when it says for this purpose we are
establishing
7 a joint industry group the tobacco industry
research
8 committee; do you see that?
9 A. Yes, I do.
10 Q. Now, Liggett didn't participate in that in
1953 as we
11 saw from that earlier document. Did you have
any knowledge
12 of that when you first took over the Liggett
group?
13 A. No.
14 Q. Let's take a look at document 161. Let's
flip into
15 the first page.
16 THE COURT: What is this? Can you
go back one
17 page.
18 MR. COUGHLIN: 161, this is a report
on a visit
19 to the USA by BATCo.
20 MR. BERNICK: Actually, your Honor,
that is a
21 mischaracterization of the document. It's a
document that
22 was written by people of the TRC, which is an
organization
23 in Britain, not a party to the case.
24 It was only admitted for purposes of
notice,
25 not for the truth of the matter as asserted.
Again, we

1034
1 have the same problem. It is cumulative,
witness doesn't
2 have personal knowledge.
3 MR. COUGHLIN: Your Honor, we are
going to tie
4 this up. This was produced from BATCo files by

TRC

5 personnel. It talks about Liggett and a visit
to the
6 Liggett people in the United States. It is
information
7 about what Liggett knew and --
8 THE COURT: If there is something
specific to
9 Liggett, you can go to that, but again, I don't
want to
10 continue to go through this just to have Mr.
LeBow go
11 through documents. Unless he's got some desire
to go
12 through these documents.
13 THE WITNESS: No, thank you.
14 MR. COUGHLIN: No, I'm forcing him
to go
15 through the documents, believe me.
16 THE COURT: There is going to be
some other
17 witnesses. If you think it is important for
the
18 background, you can go through it. But I don't
want to
19 take the time with Mr. LeBow unless there is a
particular
20 need.
21 BY MR. COUGHLIN:
22 Q. If you go to page 5 of this document, if
you could
23 blow that up.
24 It talks about Liggett initially
staying out of
25 the TIRC. Do you know who the CTR is; have you
ever heard

1035

1 of those the Council for Tobacco Research?
2 A. I've heard of it, yes.
3 Q. Do you know if Liggett was a member of
that group?
4 A. To my knowledge they were, but I don't
know the exact
5 details.
6 Q. Okay. So, you had no knowledge that the
TIRC was a
7 forerunner to the CTR; is that right?
8 A. Right, right. I really don't know about
that.
9 Q. Did anybody tell you that Liggett had
stayed out of
10 the TIRC?
11 A. Yes, I learned this in the past couple of
years.
12 Q. You learned they had stayed out initially?
13 A. Yes; I've seen this document before.
14 Q. Okay. And what did Liggett do? Did you
learn what
15 Liggett did during those years that they stayed
out of this
16 TIRC, what they did on their own?
17 A. Research-wise?

18 Q. Yes.
19 A. We just did as far as my knowledge is
normal tobacco
20 type research, just testing flavors and taste
and so forth
21 and so on.
22 Q. Let me ask you to take a look at Exhibit
250. Did
23 you have any knowledge that Liggett and Myers
had
24 contracted with the Arthur D. Little group and
did some
25 research on the biological activity of cigarette
smoke; did

1036

1 you know that?
2 A. I knew it. I've seen this document
before, also in
3 the past couple of years again. These are
documents that
4 came out of my own lawyers' files. I did not
know about it
5 before.
6 Q. And that Liggett learned that there are
biologically
7 active materials present in cigarette tobacco
that are
8 cancer causing, cancer promoting and poisonous,
back in
9 1961?
10 A. That's what the document says.
11 MR. BERNICK: Your Honor.
12 THE COURT: I thought you weren't
going to go
13 through any more documents.
14 BY MR. COUGHLIN:
15 Q. That's the last one I was going to go
through.
16 Did anyone tell you that when you
took over the
17 Liggett group?
18 A. No.
19 Q. Did anybody tell you that before; were you
shown any
20 documents before your Broin deposition?
21 A. No, I was not.
22 Q. Did you just take the company line, no
causation, no
23 addiction at that deposition?
24 A. That's correct.
25 Q. If we could go to Exhibit 379.

1037

1 Earlier you talked about the
warnings. Earlier
2 you talked about the warnings that you had put
on the
3 cigarette packages. Why did you change your
warnings from
4 the Surgeon General's warnings?
5 A. We didn't changes those warnings. We
added an

one. 6 additional warning. The smoking is addictive
company 7 Q. Now, you made an admission, right from the
8 though, that smoking causes cancer?
9 A. That's right.
10 Q. And that was the first time that was done?
11 A. That's correct.
12 Q. Could I ask you to focus on this. This is
a
13 memorandum from the file of Liggett, September
3rd, 1963?
14 MR. BERNICK: Your Honor, there is a
joint
15 defense privilege assertion to that document.
I know your
16 Honor has ruled on these matters, but we want
to make sure
17 that objection is lodged.
18 THE COURT: Okay. And I'll overrule
that
19 objection.
20 This is a what? What's the age of
this
21 document?
22 MR. COUGHLIN: This document is
1963, memo from
23 Liggett and Myers file.
24 THE COURT: What's your question
about this
25 then?

1038
blow up 1 MR. COUGHLIN: If we could actually
2 this whole paragraph.
3 THE COURT: I think he has.
4 MR. COUGHLIN: It goes further, your
Honor.
5 There is another sentence.
6 THE COURT: Okay.
7 BY MR. COUGHLIN:
8 Q. Would you take a look at this paragraph.
Did anybody
9 inform you when you had taken over the Liggett
group that
10 in fact there had been a decision made by the
companies
11 that it would be better if there was a consensus
opinion
12 that the industry could best shelter itself in
litigation
13 after such a warning were imposed by them, on
them by
14 legislation, or otherwise; do you see that?
15 A. Yes, I do.
16 Q. Anybody tell you it would be better if
somebody else
17 forced them to a put a warning on the pack, and
didn't come
18 as an admission from the company?
19 A. No.
20 Q. Anybody tell you that when you took over

the Liggett

21 group?

22 A. No.

23 Q. Anybody tell you that was a potential when
you were

24 buying?

25 A. There were a few of the folks, yes. There
was a --

1039

1 some litigation was ongoing, but these had been,
the

2 warning had been mandated by Congress.

3 Q. Nobody told you this. And nobody told you
that there

4 had been an active decision by the companies in
1963 to

5 have that warning forced on them versus
voluntarily putting

6 the warning on?

7 MR. BERNICK: Objection, there is no
foundation

8 for it, and it is very leading.

9 THE COURT: Sustained as to the
form.

10 BY MR. COUGHLIN:

11 Q. Did anybody tell you that it was the
tobacco

12 companies that had made the decision?

13 THE COURT: And I think that's what
leading is.

14 When you kind of, I think, the easier way is
did anyone

15 ever tell him anything on this.

16 BY MR. COUGHLIN:

17 Q. Did anybody ever tell you anything about
the

18 warnings?

19 A. No.

20 Q. Let me show you a document Exhibit 1092.
This is a

21 Tobacco Institute document May 1st, 1972 from
Fred Panzer

22 Vice President of the Tobacco Institute to the
President

23 Horace Kornegay?

24 MR. BERNICK: Your Honor, we have an
objection

25 to the use of this document. It will take just
a second

1040

1 if we could approach the bench briefly.

2 THE COURT: I'll let you come
forward.

3 (The following discussion was
conducted at the

4 side bar between court and counsel, out of the
hearing of

5 the jurors, as follows:)

6 MR. BERNICK: This document has not
been used

7 before. It's not been displayed to the jury

before. And
8 I've got transcript pages here from Mr. Panzer
who wrote
9 the document who says under oath there was no
personal
10 knowledge that he had to use or even make the
statements
11 that he does in that document. So, it's a
hearsay
12 document, does not fall under the exception,
and there is
13 clearly no --
14 THE COURT: I thought it was a '72
document.
15 MR. COUGHLIN: It is a '72 Tobacco
Institute
16 document, written by the Vice President of the
Tobacco
17 Institute.
18 THE COURT: There isn't hearsay use
on the
19 ancient documents?
20 MR. BERNICK: There may be. Under
even the
21 ancient documents, the author has to have
personal
22 knowledge.
23 THE COURT: You are so far-fetched
on your
24 grounds, you are wrong on that.
25 MR. BERNICK: Let me take the same
basic

1041
1 underlying fact and point to the question of
whether this
2 is competent. All evidence has to be
competent.
3 THE COURT: Let me see the document
itself.
4 MR. BERNICK: The document itself?
5 THE COURT: If the jury wants to get
up and
6 stretch a bit, you are welcome to do that.
What's the
7 grounds if it's an ancient record.
8 MR. BERNICK: All evidence has to
be, has to
9 satisfy Rule 11 requirements for being based
upon
10 knowledge and competence and is separate and
apart from
11 whether it is hearsay, the author has to know
the
12 pronouncement being made. That's why you don't
want
13 speculation, people talking about what's in
somebody
14 else's mind.
15 In this particular case he doesn't
have the
16 personal knowledge or the ability to make the
statements

17 that are made in there. And therefore, in
addition to the
18 fact, it's hearsay, I don't understand the
court's ruling.
19 Despite the basic requirements for the addition
of the
20 rules. The same thing if somebody were talking
about
21 what's in somebody else's mind.
22 MR. COUGHLIN: Your Honor, this was
written by
23 the Vice President of the Tobacco Industry.
So, no matter
24 what he says in the deposition, I have a right
to put it
25 in anyway, because what he's saying in the
deposition,

1042
1 contrary to our allegation that he was involved
with the
2 conspiracy with these other people. He knew
full well
3 what the industry was doing. He was the Vice
President
4 and he has no knowledge?
5 He's the Vice President for the
trade
6 association for the tobacco industry. And he
says he has
7 no knowledge of this. That's ridiculous. That
goes to
8 the weight. They can bring him in. They can
offer his
9 testimony if they want. But this document
comes in as an
10 ancient document.
11 THE COURT: I understand, and I'll
overrule the
12 objection.
13 MR. COUGHLIN: Thank you.
14 THE COURT: If you will retake your
seats.

15 (The following proceedings were
conducted in
16 open court.)
17 BY MR. COUGHLIN:
18 Q. Did you take a look at Exhibit 1092?
19 A. Yes, briefly, I did.
20 Q. That document is a 1972 document from
somebody at the
21 Tobacco Institute, Fred Panzer the Vice
President to Horace
22 Kornegay; do you see that?
23 A. Yes, I do.
24 Q. It talks about a strategy that was
brilliantly
25 conceived and executed over the years helping
the tobacco

1043
1 companies win court battles.
2 A. Yes, I do see it.

charge
3 Q. It says creating doubt about the health
4 without actually denying it?
5 A. Yes.
6 Q. Is that what you were told before you
testified in
7 the Brown case?
8 A. Yes.
9 Q. And you were told you were to, you were to
advocate
10 the public's right to smoke without actually
urging them to
11 take up the practice. Advocating the public's
right to
12 take up to smoke without actually urging them to
take it
13 up; do you see that?
14 A. Yes, I do.
15 Q. Let's flip over to the next page here. It
says on
16 the public opinion front, however, our situation
has
17 deteriorated; do you see that?
18 A. Yes, I do.
19 Q. It says, it talks about a strategic
impasse?
20 A. Yes.
21 Q. It talks about the erosive and adverse
effects on the
22 other fronts because here is where the beliefs,
attitudes
23 and actions of judges, juries, elected officials
and
24 government employees are formed. Do you see
that?
25 A. No, I don't see that.

1044

1 Q. Right, about strategic impasse?
2 A. Oh, yes.
3 Q. And it talks about the course that the
industry is
4 on, and it defined middle ground, which is
articulated by
5 variations on the theme that, the case is not
proved.
6 Do you see that?
7 A. Yes, I do.
8 Q. That's what you were told when you took
over the
9 Liggett group?
10 A. That's what I was basically told, yes.
11 Q. As far as obtaining the market, did you
have any
12 understanding of who your customers were, who
Liggett was
13 selling cigarettes to?
14 A. Just the general public, no specific.
15 Q. Any group, either people over age 18 or
under?
16 A. Well, you know, our brands are old brands.
And they
17 were pretty much smoked by people over 50. I

don't know

18 anything else. That's the only specifics I
remember.
19 Q. So, when you took over the Liggett, you
had no
20 knowledge that the industry was targeting kids,
no
21 knowledge of that, none whatsoever?
22 A. None whatsoever.
23 Q. Did you come to a different belief after
you did your
24 investigation?
25 A. After all these documents were looked at
by my

1045

1 attorneys, they informed me that there were
serious
2 documents here saying differently, which we
looked at and
3 said something is wrong here.
4 Q. And Liggett made an admission, the company
made an
5 admission about the industry's practice with
juveniles; is
6 that correct?
7 MR. BERNICK: I object to the form
of the
8 question.
9 THE COURT: Why don't you rephrase
the
10 question.
11 BY MR. COUGHLIN:
12 Q. First give your, did you make a personal
knowledge
13 statement about this issue in the industry?
14 A. Yes, I did.
15 Q. And what was that?
16 A. That I believed the industry had targeted
young
17 people with such campaigns as Joe Camel and
things of that
18 nature.
19 Q. Okay. And what brought you, what brought
that to
20 your attention? Did you have a personal
knowledge
21 experience that brought that to your attention?
22 A. Yes; I had an experience. Amongst other
things one
23 of my grandsons came to me about two years ago
and said
24 what business are you in, grandpa? I said
cigarettes.
25 He immediately said to me, you mean
like Joe

1046

1 Camel. I said how do you know about Joe Camel?
He's
2 seven years old. That, plus the documents that
my lawyers
3 reviewed just led me to this conclusion.

4 Q. Did, to your knowledge was Liggett
targeting the
5 youth market?
6 A. Absolutely not.
7 Q. Do you know what's going on with Liggett
market
8 share?
9 A. Liggett's market share, since we announced
our
10 settlement in 1995, has been steadily going
down. I think
11 the industry has been targeting Liggett, in my
opinion.
12 Q. What happened when you made these
admissions about
13 disease causation and addiction; what happened
to your
14 sales?
15 A. Our sales, as I said, started going down
in 1995, in
16 '96 rather.
17 Q. Did you have that dramatic decrease?
18 A. No, over a period of time, '96 was about,
okay,
19 starting in '97, '98 it started to go down.
20 Q. Let me ask you to flip past a bunch of
documents to
21 Exhibit 1807. Have you ever seen this document?
It is
22 from Horace Kornegay, the gentleman who received
the last
23 document, a March 6, 1978 document to the
subcommittee on
24 health and the environment?
25 A. I don't recall seeing this before.

1047

1 Q. Did you know that the industry had told
Congress that
2 they weren't targeting kids?
3 A. The industry --
4 MR. BERNICK: Objection, lack of
foundation.
5 THE COURT: Sustained.
6 BY MR. COUGHLIN:
7 Q. Did anybody tell you -- I'll just move on.
If we
8 could pull up exhibit 1825. If I could have you
take a
9 look at that?
10 MR. BERNICK: Your Honor, again this
is a
11 document that has already been shown to the
jury came from
12 the files of another defendant, not from the
Liggett
13 group. And I object as it being cumulative and
without
14 foundation.
15 MR. COUGHLIN: I'm going to ask him
about his
16 own experience, your Honor, in regards to this.
Do you

17 see?
18 MR. BERNICK: Your Honor, he can't
have any
19 experience with regards to it because he has no
personal
20 contact with this document or with the company
from which
21 it came.
22 MR. COUGHLIN: Your Honor, these
defendants are
23 going to attack him, his motivations for coming
forward
24 and settling. I think the foundation for doing
that has
25 to be laid with this witness about the
documents in this

1048

1 case and the knowledge he learned.
2 So, he did have a basis to enter
into the
3 settlement he did.
4 MR. BERNICK: He testified there
weren't any
5 documents before he entered the settlement.
6 THE COURT: I'll sustain. I don't
think you
7 need to go through this. I think it is
cumulative. So,
8 why don't you go on to some other lines of
questioning.
9 But I don't think we need to go through the
document.
10 It's already in the record from other
witnesses.
11 BY MR. COUGHLIN:
12 Q. Was it your understanding when you
reviewed
13 everything did you feel that Liggett had
abdicated the
14 scientific research to its lawyers, the
direction of the
15 company?
16 A. Say that again.
17 Q. When you had taken a look at the
documents, the
18 internal documents, did you come to the belief
or any
19 believe at all about whether Liggett had
abdicated the
20 direction of the scientific research of the
company to
21 lawyers?
22 A. We, again I say we didn't do much, any
scientific
23 research at Liggett.
24 Q. Do you know why?
25 A. One main reason, we didn't have the money,
couldn't

1049

1 afford it, to be honest with you.
2 Q. You were the smallest company, right?

3 A. Yeah; we were too small.
4 Q. I would like you to take a look at Exhibit
2176. We
5 can go ahead and go to the cut out.
6 I ask you to take a look at this
document we
7 talked earlier about the CEO who you appointed,
the CEO in
8 1990, a Mr. Horrigan?
9 A. That's right.
10 Q. Was that E. A. Horrigan, Jr.?
11 A. Same one.
12 MR. BERNICK: Again, the document
being
13 displayed has already been shown the jury,
subject to
14 testimony from another client. Again, it's
cumulative,
15 and there is a lack of foundation.
16 MR. COUGHLIN: Your Honor, this
document is
17 addressed to Mr. Horrigan who then became the
CEO of
18 Liggett at a time when he went in front of
Congress. And
19 it's directly relevant to the issues and the
knowledge his
20 company had at the time before he went to
Congress about
21 what was going on.
22 MR. BERNICK: This witness can't
establish that
23 from this document. He has no personal
knowledge.
24 THE COURT: I'm going to ask that
counsel
25 approach once.

1050

1 (The following discussion was
conducted at the
2 side bar between court and counsel, out of the
hearing of
3 the jurors, as follows:)
4 THE COURT: You indicated you were
not going to
5 go through these documents with him again.
Other
6 witnesses went through these documents. I
don't know why
7 you are asking him. I believe his testimony
has been what
8 it has been. And beyond this, you are going
through
9 obviously what he did. He doesn't have any
expertise in
10 it.
11 MR. COUGHLIN: This one point,
however, is that
12 his CEO.
13 THE COURT: You can ask him to
describe his
14 relationship with his CEO and when, why he

fired him. And
15 I don't want to go through these documents that
are
16 otherwise in the record.
17 MR. COUGHLIN: Don't I get to
establish at the
18 time he was telling the CEO with evidence in
the record
19 that his CEO knew something different, RJR had
been
20 targeting children.
21 THE COURT: He doesn't know that.
22 MR. COUGHLIN: He knows he was told
the
23 opposite from his CEO.
24 THE COURT: You can talk about him
and his CEO,
25 which is a different issue. But I don't want
to go

1051
1 through all these documents.
2 (The following proceedings were
conducted in
3 open court.)
4 BY MR. COUGHLIN:
5 Q. Did Mr. Horrigan, when he came to work for
you, did
6 he tell you anything about RJR's practices with
regards to
7 marketing to children?
8 A. No; he did not.
9 Q. He didn't mention anything at all about
targeting an
10 under age market?
11 A. Absolutely none.
12 Q. And did you fire Mr. Horrigan?
13 A. Yes.
14 Q. Why?
15 A. I thought his performance was poor.
16 Q. Let me, if I could ask you to take a look
at Exhibit
17 4268?
18 A. I don't think it's here in the book. It's
not in
19 this book.
20 Q. Do you see that exhibit there?
21 THE COURT: He can look to the right
as well.
22 THE WITNESS: Yes, it's easier
there.
23 BY MR. COUGHLIN:
24 Q. This is the exhibit that shows the
structure of CTR,
25 and it shows Liggett and Myers, Brown &
Williamson,

1052
1 American Tobacco Company, Lorillard, Philip
Morris, and
2 RJR; do you see that?
3 MR. BERNICK: Your Honor, we move to
strike the

record 4 statement of counsel. I don't believe there is
in fact is 5 evidence at this point that establishes this is
form of the 6 the organization for CTR. So, I object to the
question and move to strike the statement.
counsel 8 THE COURT: Well, he can't give --
the 9 doesn't have knowledge. Why don't you rephrase
question.
10
11 BY MR. COUGHLIN:
12 Q. Okay. Have you ever, did you understand
the 13 structure of CTR or that Liggett was a part of
it?
14 A. I didn't understand it.
15 Q. Okay. Were you paying dues to the Tobacco
Institute?
16 A. Yeah, for a while we were, yes.
17 Q. Do you know if you were paying any dues to
CTR at the
18 time you took Liggett over?
19 A. I don't know.
20 Q. Okay. And this will be my last document
if we could
21 take a look at 3369.
22 If we could flip in, this is a Brown
&
23 Williamson document, flip to the next part. It
talks
24 about all the major tobacco companies in the
U.S. except
25 Liggett and Myers now use some form of ammonia
technology.

1053
of ammonia 1 It is estimated that about five million kilos
United 2 compounds are used by tobacco companies in the
cigarette 3 States. This equates to 10 milligrams for every
4 produced in the U.S.
5 Do you see that?
6 A. Yes.
7 Q. Do you know why these other companies were
using
8 ammonia technology and Liggett was not?
9 A. It is my understanding that Liggett was.
10 MR. BERNICK: I object to his, he
has personal
11 knowledge or doesn't have personal knowledge?
12 MR. COUGHLIN: I'm asking what your
13 understanding is.
14 THE WITNESS: My understanding is
that --
15 THE COURT: Well, I think he owned
the company.
16 He can testify to his understanding.
17 MR. BERNICK: Of his company.
18 THE COURT: Yes, he can testify.

That's what I
19 thought the question went to.
20 MR. COUGHLIN: That's what it does.
21 THE COURT: Why don't you testify as
to what
22 your understanding is as to why it was or
wasn't used by
23 your company. I don't think you can testify as
to why
24 other companies did or didn't use it.
25 MR. COUGHLIN: I don't disagree.

1054
1 THE WITNESS: I really don't know
why it wasn't
2 used, was used or was not used in this case by
my company.
3 The other -- again my understanding is that
ammonia
4 technology is used to --
5 MR. BERNICK: Your Honor, again he's
--
6 THE COURT: Sustained, just go ahead
and do
7 another question.
8 THE WITNESS: Sorry, sorry.
9 MR. COUGHLIN: I have no further
questions of
10 this witness.
11 THE COURT: Cross examination.
12 CROSS EXAMINATION
13 BY MR. BERNICK:
14 Q. Good morning, Mr. LeBow.
15 A. Good morning.
16 Q. My name is David Bernick, and I represent
Brown &
17 Williamson and British American Tobacco Company.
Good
18 morning, ladies and gentlemen.
19 Mr. LeBow, I think you told us about
the
20 decision you took to change your company's
statements
21 regarding causation and addiction, correct?
22 A. Correct.
23 Q. And is it correct that that decision was
taken in
24 about March of 1997?
25 A. Correct.

1055
1 Q. And I think you have told us, including
some very
2 personal discussions that you have told this
jury, that
3 that was a heart felt change of view, correct?
4 A. Correct.
5 Q. That's what you represented?
6 A. And based upon documents that my lawyers
had
7 reviewed.
8 Q. Now, at this point in time, in connection
with this

9 case, you and your company have reached an
agreement, a
10 proposed agreement to settle all of your
disputes with the
11 plaintiffs here, true?
12 A. That's correct.
13 Q. This trial will not determine anything as
concerns
14 you or your company, correct?
15 A. Somewhat correct, not totally.
16 Q. Well, this jury will pass judgment on no
claim that
17 relates to your company, correct?
18 A. That's correct.
19 Q. And in fact, you have a proposed
settlement agreement
20 that imposes certain requirements on you; does
it not, Mr.
21 LeBow?
22 A. That's correct.
23 Q. And one of the requirements that it
imposes upon you
24 is your cooperation in making witnesses
available even for
25 trial, correct?

1056
1 A. All my previous settlements did the same
thing.
2 Q. And you testified before, correct?
3 A. That's correct.
4 Q. And every time you testified, you
testified pursuant
5 to contractual obligations that require you to
appear at
6 the request of plaintiff's counsel, correct?
7 A. And also something we want to, I want to
do.
8 Q. And also something you want to do.
9 Isn't it also true that if you
satisfy the
10 terms of the agreement that you have reached
with these
11 plaintiffs, if you cooperate, that you will not
have to
12 pay a dime in order to resolve the claims that
have been
13 made against you and your client?
14 MR. COUGHLIN: I object. That
mischaracterizes
15 the settlement, your Honor.
16 THE COURT: He can answer that,
overruled. Is
17 your testimony the only condition you have to
undertake?
18 THE WITNESS: Well, I've studied the
document,
19 but I think there are some other things
regarding FDA and
20 smoking and health emissions, et cetera, et
cetera, not
21 just testimony. It is something standard we do
in every

22 settlement agreement.
23 BY MR. BERNICK:
24 Q. You have not read the settlement agreement
in this
25 case, Mr. LeBow?

1057
1 A. No; I have not read it.
2 Q. Do you have any understanding at all as to
whether
3 you are going to have to pay any money to settle
this case?
4 A. I have an understanding that we do not
have to pay
5 any money at this time. However, based upon
some other
6 union cases that may come up around the country,
if there
7 are settlements or judgments in those cases, we
would have
8 to pay the State of Ohio unions.
9 Q. Right now, this case being settled, you
don't have to
10 pay a dime?
11 THE COURT: He just answered your
question.
12 Why are you asking him again? I think he just
said if
13 other cases come in, that he has to pay in
other states.
14 He has to pay them in this one.

15 BY MR. BERNICK:
16 Q. With regard to those other cases, if you
don't in
17 fact have to pay any money in those cases too,
you don't
18 have to pay anybody in connection with any of
the union
19 cases, correct?
20 A. I don't think necessarily that. I think
if there are
21 judgments against the other companies or against
us, it is
22 not a question of settlement. We would have to
pay.
23 Here again, I didn't study the legal
details
24 and documents. But my understanding is that
the Ohio
25 unions have what is called a most favored
nations

1058
1 clause. If there is a judgment or payment
required by us
2 in other states, we would have to pay here
also.
3 Q. Isn't it true that what your settlement
agreement
4 says is that for this reason the settling
defendants --
5 that's you and your company, correct?
6 A. Yes.

7 Q. -- will not be obligated to pay money to
the
8 plaintiff's funds or to the class unless such
settling
9 defendants enter into monetary settlements with
the other
10 health and welfare trusts as set forth in
section 6.2.
11 Is that your understanding, Mr.
LeBow?
12 A. I haven't read it. That's what it says.
There might
13 be another paragraph regarding judgment. What
if there is
14 a judgment in another case?
15 Q. Do you have any knowledge there is such a
provision?
16 A. I do not have any.
17 Q. And you didn't take enough time or care
before you
18 came in to testify before this jury in this case
to even
19 read the document for which you are settling the
case,
20 right?
21 MR. COUGHLIN: I object. It's
argumentative,
22 your Honor.
23 THE COURT: Overruled. Did you read
it?
24 THE WITNESS: No, I did not read it.
25 BY MR. BERNICK:

1059
in time at
1 Q. Mr. LeBow, I want to go back to the point
2 which you became involved with Liggett, okay?
3 A. Okay.
4 Q. 1986 is when you, through some other
companies,
5 acquired control of Liggett, correct?
6 A. Yes.
7 Q. Now, how long has Liggett been in business
before you
8 became involved?
9 A. I guess the late 1800's.
10 Q. Late 1800's. So, would it be fair to say
when it
11 comes to the tobacco business you are pretty
much of a
12 newcomer, correct?
13 A. That's correct.
14 Q. Now, prior to 1986 when you decided you
would become
15 involved in the tobacco business, isn't it true
that you
16 were, by your own words, an independent
entrepreneur?
17 A. Correct.
18 Q. And isn't it true when it came time and
you decided
19 to purchase, your position indirectly in the
Liggett

20 tobacco business, that you purchased it in order
to assume
21 a role in Liggett as a quote strategic owner,
correct?
22 A. I don't know what you mean by strategic
owner.
23 Q. Haven't you testified previously your role
in Liggett
24 was to act as a strategic owner?
25 A. If you mean as a chairman to direct the
strategy, the

1060

1 answer is yes. If you are not involved in the
daily
2 operations, that's what you do.
3 Q. Do you recall testifying --
4 THE COURT: I think he's answered
the question.
5 I don't know his answer was in any ways
inconsistent with
6 your thinking. He says he owned the company,
but didn't
7 deal with it day-to-day.
8 MR. BERNICK: I was asking if his
own words
9 were strategic owner.
10 THE COURT: Didn't he agree with
what? You
11 asked him, did he not say he didn't get
involved in the
12 day-to-day operation? And isn't that the gist
you asked
13 him?
14 MR. BERNICK: I was looking for the
term.
15 THE COURT: Is there some importance
with that
16 specific term?
17 MR. BERNICK: I think there is, but
I would be
18 happy to move on, your Honor.
19 THE COURT: Why don't you move on.
20 BY MR. BERNICK:
21 Q. After you purchased your position in
Liggett and you
22 became involved in your role in Liggett, it's
true, is it
23 not, that you had the opportunity to basically
ask anybody
24 at Liggett to come into your office and tell you
about any
25 aspect of Liggett's business, correct?

1061

1 A. That's correct.
2 Q. And that also included the lawyers, right?
3 A. That's correct.
4 Q. I think you have said that repeatedly in
response to
5 the questions that were asked of you by
plaintiff's
6 counsel, nobody told me this or nobody told me

that,

7 correct?

8 A. Yes.

9 Q. But as the boss, if you wanted to learn
about any
10 aspect of Liggett's business, including smoking
and health
11 in particular, you had the ability to have the
scientists
12 come in or have the lawyers come in and to bring
in files
13 and educate you; is that correct?

14 A. That's correct.

15 Q. At the time you bought your position in
Liggett in
16 1986, I want to cover a little bit about what
you
17 ultimately came to know about smoking and health
for just a
18 moment.

19 Isn't it true that at the time you
acquired
20 your position, you knew that warnings had been
on
21 cigarette packages for more than 20 years, or
about 20
22 years, correct?

23 A. Correct.

24 Q. Isn't it true that those warnings
pertained to the
25 health risk that were associated with smoking?

1062

1 A. Correct.

2 Q. Isn't it also true that you learned
Liggett had been
3 and was a defendant in litigation?

4 A. At that time, yes.

5 Q. You also learned that smoking and health
issues were
6 a matter of publicity in the press, correct?

7 A. There were some press on it, yes.

8 Q. You also learned there were Surgeon
General reports
9 that had been issued from time to time, correct?
10 A. Correct.
11 Q. Isn't it true that during the whole period
of time
12 from 1986 when you acquired your position, all
the way
13 through 1997 and beyond, you never read any part
of a
14 single Surgeon General's report; isn't that
true?

15 A. I haven't read it in detail; that's
correct. I've
16 read newspaper articles on it.

17 Q. You never read any portions of the Surgeon
General
18 reports themselves, correct?
19 A. Exactly, correct, yes.
20 Q. Is it also true that you never looked at
any smoking

21 and health information that Liggett itself might
have had,
22 correct?
23 A. Like what?
24 Q. Any smoking and health information that
Liggett might
25 have had, you never even looked for it, correct?

1063

1 A. Before 1996? That's correct.
2 Q. Isn't it also true that when it came to
the Research
3 and Development Department at Liggett, you never
went in
4 that door to ask any of those scientists if they
knew
5 anything about smoking or not, correct and
health, correct?
6 A. I was told that the Research and
Development
7 Department was just doing research into tobacco
flavors and
8 types of tobacco and things of that nature.
9 Q. My question is, did you ever go in that
door to find
10 out for yourself by asking any of the scientists
who worked
11 in research and development what they knew about
smoking
12 and health?
13 A. No, I didn't. And I never do things like
that, walk
14 around a company and go in every door and ask
them
15 questions. It is not my style.
16 Q. Recognizing smoking and health was an
issue, and you
17 know was an issue facing your business, you
never sought to
18 inquire on that issue in particular with regard
to the
19 scientists at Liggett, correct?
20 A. I was told by the lawyers that for forty
years they
21 never paid a penny. And it was not really an
issue. I
22 shouldn't worry about it. So, that's what I
did.
23 Q. You didn't worry about it and you didn't
care enough
24 to go ask the scientists?
25 A. That's true.

1064

1 Q. Isn't it true you can't even name the name
of a
2 scientist at Liggett during the period of time
prior to
3 1997?
4 A. Well, by definition, if I didn't go in the
door, I
5 don't know their names; that's correct.
6 Q. Ever ask about whether there was any safer

cigarette
7 research?
8 A. I heard a little about something that was
done at
9 Liggett years ago, but that's nothing
significant.
10 Q. Didn't concern you either?
11 A. That's correct.
12 Q. Would it be fair to say over the entire
period of
13 time that we are talking about here, that you
took no
14 interest whatsoever in the scientific affairs of
Liggett?
15 A. Correct, from '86 to '96; that's correct.
16 Q. What about addiction, did you ever talk
about
17 addiction with people at Liggett?
18 A. No.
19 Q. Let's talk about your own personal
experience. You
20 mentioned that you had smoked at one time,
correct?
21 A. Correct.
22 Q. And for a period of about 10 or 15 years,
right, Mr.
23 LeBow?
24 A. Something like that.
25 Q. And in the middle 1960's I think you told
us you
1065
1 decided to quit based on some information you
had about
2 health risks?
3 A. 1969, yes.
4 Q. I think you told the jury this morning
that decision
5 was an agonizing decision?
6 A. It took me a while to get over the
effects, yes.
7 Q. In point of fact, you quit cold turkey,
didn't you
8 Mr. LeBow?
9 A. After going to the hospital and being
scared out of
10 my mind by seeing black lungs from the hospital,
yes, I
11 quit that day.
12 Q. And you quit that day, and when you were
asked in
13 1993, you said I quit like (snapping fingers)
that,
14 correct?
15 A. That day, yes. But it was agonizing for
the next 2
16 or three months.
17 Q. You have made mention of the fact by the
time we get
18 to 1997 you had some contact with, I think you
said some
19 secret contact with some new attorneys?
20 A. Yes.

21 Q. And you have talked about the nature of
that contact.
22 Isn't it true that by 1997, even after you had
met with
23 your new attorneys, that you had not reviewed a
single
24 piece of paper from Liggett's files or from
anybody else's
25 files relating to smoking and health?

1066

1 A. Well, there were thousands of documents.
I turned
2 them over to my lawyers to review them. My new
lawyers, I
3 trusted my new lawyers to review them on my
behalf, yes.

4 Q. The answer to my question is yes?

5 A. Personally, I had not looked at them. My
attorneys
6 had looked at them.

7 Q. And even when it comes to pieces of paper,
any
8 documents that were from outside the companies
regarding
9 smoking and health, as of March, 1997, when you
had this
10 change of heart, you had not reviewed a single
outside
11 document relating to smoking and health when you
made this
12 decision, correct?

13 MR. COUGHLIN: I would object. He's
already
14 asked and answered.

15 THE COURT: I think he's answered
it. Go on to
16 something else.

17 BY MR. BERNICK:

18 Q. Let's talk about another development that
was taking
19 place during this same period of time, which is
what was
20 happening financially to your business, Mr.

LeBow. You
21 testified that your market share has been going
down, I
22 think you said, during particularly during 1997
and 1998,

23 was that your testimony on direct examination?

24 A. That's correct.

25 Q. And I think you made the point that
somehow since

1067

1 this change of heart in 1997, that you felt that
some of
2 the other companies were kind of retaliating
against you,
3 correct?

4 A. Can't prove anything, but my market share
was going
5 down by significant amounts '97, '98, right

after all these

6 settlements, these admissions were made.

7 Q. Let's talk about the period of time prior
to 1997,

8 okay?

9 Isn't it true that when you got
involved with

10 the affairs of Liggett, that they were pursuing
a part of

11 the cigarette business that we'll call the
generic brand
12 business?

13 A. Correct.

14 Q. And the generic brand business is a lower
price

15 business, correct?

16 A. Correct.

17 Q. Basically, for every pack of cigarettes
sold the

18 retail price is somewhat lower. So, the margin
or the

19 difference between retail price and the costs of
producing

20 the cigarettes, that margin is lower and there
are lower

21 profits per pack?

22 A. Correct.

23 Q. Which means if you want to make money, the
idea is to

24 be able to sell more packs, correct?

25 A. That's always the idea.

1068

1 Q. With this generic business, if you don't
sell enough

2 product, you have a lot of hard -- they have a
lot of

3 difficulty making any kind of profit at all,
correct?

4 A. Correct.

5 Q. Now, when it comes to what was happening
with your

6 market share, isn't it true that in 1991 the
market share

7 of Liggett was about 3.4 percent of the U.S.
domestic

8 market?

9 A. Yes. But the year before it was less. We
had a new

10 brands coming out that peaked in 1991 if I
recall properly.

11 Q. Okay. 1991, 3.4 percent?

12 A. Well, that's not our average percentage.
Our average

13 percentage was in the 2, 2 and a half, 2.7
percent range,

14 going down constantly every year, because our
old brands --

15 hate to say it -- our old customers were dying
off.

16 And since we don't target children,
by

17 definition it will go down on a slow basis.

18 MR. BERNICK: Move to strike, your
Honor.
19 THE COURT: Overruled.
20 BY MR. BERNICK:
21 Q. In 1992 your market share had declined to
3.0?
22 A. You know, the numbers I don't.
23 Q. If you want we can go through the case?
24 A. I don't know the numbers, exactly. That's
all I'm
25 saying.

1069
1 Q. One of the reasons your market share
declined in 1992
2 was that other companies, the people that are
sitting here
3 in this courtroom, their clients were starting
to compete
4 with you in the generic or low cost brand
business,
5 correct?
6 A. That, plus the fact that our brand
business was
7 constantly declining at about a 15 percent per
year rate,
8 two factors.
9 Q. 1993 your market share went down to 2.4,
correct?
10 A. Again, I'm agreeing with you. But I don't
have the
11 exact figures.
12 Q. Well, 1993 was the year of Marlboro
Friday, correct?
13 A. Correct.
14 Q. And Marlboro Friday -- Marlboro is a
premium brand,
15 correct?
16 A. Correct.
17 Q. Which means that as opposed to the generic
brands the
18 premium brands are a higher price and they have
a higher
19 margin, correct?
20 A. Correct.
21 Q. And when Marlboro Friday occurred, Philip
Morris cut
22 the retail price or cut the selling price of
Marlboros,
23 right?
24 A. Right.
25 Q. And the effect of that was that some of
the people

1070
1 who were buying generic or low cost brands
before said,
2 well gee, the price of Marlboro is close enough
that maybe
3 I'll switch to Marlboro, correct?
4 A. Correct.
5 Q. And the net effect of that means when
Marlboro Friday

generic
6 occurred it had a significant impact upon your
7 brand business, correct?
8 A. It had a significant impact on everyone's
business
9 that year.
10 Q. But it had a significant impact on your
generic brand
11 business; did it not?
12 A. I don't believe. I don't recall exactly.
13 Q. Isn't that what your 10K says?
14 A. Again, I don't write the 10K's. But it
probably did
15 say that and had an impact, yes.
16 Q. Did you read the 10K which was issued?
17 A. Sometimes. Sometimes I read them,
sometimes I don't.
18 Q. The 10K's --
19 THE COURT: Is there some relevance
about his
20 10K?
21 MR. BERNICK: I think it goes to
whether the
22 witness has any familiarity what's going on in
the
23 business that he is running.
24 THE COURT: Does that have any
relevance
25 particularly what we are here on?

1071
1 MR. BERNICK: Yes, because I think
it will
2 establish what the real motives were for the
change of
3 heart he had in 1997.
4 THE COURT: We are talking about now
1992.
5 MR. BERNICK: I'm trying to get to
1993. And I
6 really will move through the rest of the years.
I'll
7 progress the examination, your Honor.
8 THE COURT: Okay, let's move it
along. But
9 let's try to stay to something that has some
relevance to
10 this case.
11 BY MR. BERNICK:
12 Q. Would it be fair to say in each of the
successive
13 years all the way through 1997, that your market
share
14 continued to decline?
15 A. I think if you look at '96, again, you
have the
16 numbers on your own. I think you will see in
'95, '96 it
17 started to stabilize around the 2.1, 2.2 range.
So, it was
18 pretty stable in 1996.
19 Q. In point of fact, in 1996 your market
share, by 1995

market 20 your market share was down to 2.2. In 1996 your
21 share was down to 1.9 percent?
much of a 22 A. 2.2, 1.9 it is ever so close. It's not
23 difference.
correct? 24 Q. In 1997 your market share dropped to 1.3,
25 A. That's correct.

1072
you make 1 Q. Now, in the middle of this whole episode
Reynolds 2 mention of some dealings that you had with R.J.
3 shareholders; did you not?
4 A. Correct.
shareholders 5 Q. And in your dealings with R.J. Reynolds
6 those took place between the period of 1995 and
1997? 7 A. No, '95 to '96.
8 Q. '95 to '96?
9 A. Early '96.
developed an 10 Q. And at that time, in 1995 and 1996, you
11 idea which you made reference to on direct
examination, you 12 developed an idea whereby you, your company
would merge 13 with R.J. Reynolds and some foreign tobacco
company.
Nabisco up 14 You would then split R.J. Reynolds
15 into two parts, a food business and tobacco
business, 16 right?
17 A. That's correct, which all the shareholders
agreed to. 18 Q. We'll get to that in a minute.
19 And as a result of that transaction
you stood 20 to gain about 350 million dollars in preferred
stock and a 21 20 percent common stock position, correct?
22 A. No; that was never proposed.
23 Q. Wasn't that exactly what your motive was
for getting 24 involved in that transaction financially?
25 A. No, we owned RJR Tobacco, and we wanted
RJR stock to

1073
all. 1 go up by splitting up the companies; that was
2 Q. That was the proposal you made, to merger
the foreign 3 tobacco companies and split them?
4 A. No. That was one meeting you were
characterizing, 5 one meeting. There was never a proposal ever
made of that 6 nature.

people?
the RJR
allude to,
It never
then went
another
this food
was never a
Africa.
correct?
answered.
Reynolds,
with your

7 Q. That was the meeting you had with the RJR
8 A. There was one meeting I ever attended with
9 people. The foreign tobacco people, that you
10 were never a party there. It was just an idea.
11 got beyond one meeting and one concept.
12 Q. Well, even beyond that one meeting you
13 around the world trying to line up support from
14 tobacco company, correct?
15 A. Yeah, support to buy stock and help me get
16 and tobacco company split, not to merge. That
17 conversation.
18 Q. And you went to London, you went to South
19 You went to Spain, and they all turned you down,
20
21 MR. COUGHLIN: He's already
22 THE COURT: Sustained.
23 BY MR. BERNICK:
24 Q. When you purchased your position in R. J.
25 isn't it a fact you didn't buy that position
personal money?

1074

entities that you
owned?
A. Yes.
Q. One that just had come out of bankruptcy?
A. That's correct.
Q. And ultimately your effort, you conducted
a proxy
fight for R.J. Reynolds?
A. Right.
Q. And ultimately the shareholders of R.J.
Reynolds
rejected your proposals and you lost the proxy
fight.
A. After I settled in 1996, the RJR
shareholders and
settling. The
whole world was against us settling.
Q. Is the --
A. I would like to finish my answer.
MR. COUGHLIN: Objection.
THE COURT: Let him finish his
answer.
A. There were two votes involved in the proxy
fight.
One was the shareholders to agree to split up
Nabisco and

1 A. No, that's correct.
2 Q. You used the monies from one of the
3
4
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21 the tobacco company. That was in early 1996.
That we won.
22 53 percent of all the shareholders voted for us.
23 As a matter of fact, it's the first
time that a
24 Fortune 100 company that the shareholders voted
for
25 a certain action on a solicitation.

1075

1 Then before the proxy fight, before
the so
2 called proxy fight in early '96, I entered into
the first
3 settlement, okay? And announced the first
settlement I
4 described with all the Attorneys General.
5 And yes, then all the stockholders
turned on
6 me. They voted no again three months later.
7 Q. You lost the proxy fight, Mr. LeBow?
8 A. Lost it drastically because of the
settlement.
9 Q. As a result of the loss of the proxy
fight, the
10 companies, the loss that you sustained from your
stock, the
11 loss to one of the companies that bought that
stock was
12 about 15 million dollars, correct?
13 A. Our expenses were 15 million.
14 Q. Your expenses were 15 million dollars?
15 A. Yes.
16 Q. Now, we go to 1997, and isn't it true by
1979 we have
17 heard, seen that Liggett's market share was 1.9
percent?
18 A. That's what you said, yes.
19 Q. And isn't it true there was now a
substantial
20 question whether Liggett would even be able to
continue as
21 a viable company, correct?
22 A. When you get down to that market share, it
becomes
23 obvious, yes.
24 Q. And do you think it's fair to say by that
point in
25 time Liggett was being financially clobbered as
a result of

1076

1 competition in the marketplace with the other
players in
2 the industry; wasn't that happening?
3 A. That's actually what I just said a few
minutes ago.
4 Q. And as a result of all these different
factors, isn't
5 it true when you had this change of heart in
1997, that was
6 a change of heart because you could not afford
to sustain a

7 single judgment against Liggett in connection
with the
8 litigation that was pending before Liggett,
correct?
9 A. That would be true back in 1993, '94, '95
or '96.
10 That had nothing to do with it. That was true,
yes, but it
11 was nothing newly true in '97.
12 Q. And reaching a settlement with the AG,
Attorneys
13 General, was necessary for you to survive; isn't
that
14 correct?
15 A. When I did the first settlement, that's
absolutely
16 true in 1996. One of my motivations was that we
could not
17 sustain or even post a bond being a small
company. We are
18 not Philip Morris. We are not RJR. We don't
have the
19 financial resources to post even a small bond,
let alone a
20 large bond.
21 That was one of my first
motivations,
22 absolutely correct, in '96, not '97.
23 Q. And isn't it true when you reached the
settlement in
24 1997 that was a settlement that you felt was
strategically
25 in the best interests of you and the companies
that you

1077

1 were involved in, including Liggett, correct?
2 A. No, at that point I had already settled.
I had
3 already so called broken through the ranks and
settled,
4 broken ranks and done it in 1996.
5 At this point in 1997 I had access
to all these
6 documents and saw the technical things being
done. And I
7 wanted to settle. I had to settle.
8 Q. You had to settle?
9 A. Emotionally I had to settle from my heart.
I wanted
10 these documents out. I wanted to release
things. I, and I
11 settled.
12 Q. You are telling this jury the settlement
was not
13 financially in your interest?
14 A. The financial part of it was part of it
because we
15 couldn't afford any judgment. I agree with
that. There is
16 no question about that. But that was not the
motivating
17 factor in 1997.

word 18 Q. Mr. LeBow, today you have talked about the
correct? 19 cause, in 1997, you talked about the word cause,
20 A. Correct.
21 Q. And isn't it true that when it comes to
the 22 relationship between cigarette smoking and
disease you 23 can't scientifically distinguish between cause
and risk 24 factor, correct?
25 A. I am not a scientist; that's correct.

1078
the 1 Q. Now, when you reached your settlement with
requirement 2 Attorneys General in 1997, isn't it true that a
white, was 3 of that settlement, written out in black and
the word 4 that you use that word cause, instead of using
5 risk factor?
6 A. Correct.
7 Q. Isn't it true that another requirement of
the 8 settlement in March of 1997, was that you used
the word 9 addiction rather than dependence or habit?
10 A. Absolutely right.
11 Q. Written out in black and white?
12 A. Absolutely, correct.
13 Q. And isn't it true then, as now, you
personally don't 14 know the distinction between addiction,
dependence or 15 cause?
16 A. I'm not a doctor or scientist, but in my
heart I 17 think I know.
18 Q. In your heart do you know about the
documents that 19 you have been asked to testify about?
20 A. These documents?
21 Q. Yes.
22 A. Some of them I've seen, some I have not
seen before, 23 yes.
24 Q. In point of fact, all the documents that
you have 25 seen about smoking and health in all of those
documents are

1079
plaintiff's 1 documents that were basically given to you by
cases? 2 counsel, correct, in this case or in other
3 MR. COUGHLIN: I object, your Honor.
I think 4 they were the Attorneys General.
5 MR. BERNICK: I said this case or

other cases.

6 A. My lawyers had access to these documents
and other
7 documents. They may have seen them or may not
have. I
8 don't know.
9 Q. My question wasn't clear. I'm talking
about the
10 documents you have personally seen. We have
already
11 established that the lawyers you asked to do
this
12 investigation for you never actually showed you
personally
13 any of the documents that you reviewed, correct?
14 A. Correct.
15 Q. So, all the documents that you have seen
you have
16 seen since 1997 in connection with your role
coming in and
17 testifying at these trials, correct?
18 A. That's basically correct, yes.
19 Q. So, basically the plaintiff's lawyers,
either in this
20 case or in one of the other prior cases, asked
you to come
21 in as part of your settlement agreement. They
give you a
22 stack of documents and asked you to take the
stand so they
23 he can show you the documents and ask you
whether you have
24 seen them or not; is that correct?
25 MR. COUGHLIN: I object.

1080

1 THE COURT: Sustained.
2 BY MR. BERNICK:
3 Q. Let's talk about a couple of documents
that you were
4 shown this morning. You were shown this
document here; do
5 you recall that?
6 A. I can't see it.
7 Q. You can't see it?
8 MR. COUGHLIN: What exhibit is it?
9 MR. BERNICK: It's exhibit 15.
Remember it's
10 the forwarding memorandum.
11 A. Yes.
12 Q. And then you were shown another one,
background
13 material on the cigarette industry client; do
you see that?
14 A. What number is that?
15 Q. This is number 41?
16 MR. COUGHLIN: I object, your Honor.
I didn't
17 even get to ask any questions about this
document 41. I
18 had to flip off because there was an objection.
19 MR. BERNICK: I'm not going to ask
about the

20 content of the documents. I'm going to ask how
he came to
21 be in the --
22 THE COURT: If he wasn't asked
questions about
23 this document, you objected to putting the
document up,
24 and now you want to go into how he knows about
it?
25 MR. BERNICK: I don't want to go
into the

1081

1 content of the document.
2 THE COURT: Why did you put it up?
3 MR. BERNICK: I wanted to refresh
his
4 recollection of what I was going to ask him
about. I'll
5 just ask the question.
6 THE COURT: Why don't you just go on
to
7 something else.
8 BY MR. BERNICK:
9 Q. Let's talk about the Frank statement. Do
you recall
10 the Frank statement was shown this morning?
11 A. Yes.
12 Q. There are a series of commitments that are
made in
13 the Frank statement, correct?
14 A. Yes.
15 Q. Now, you are familiar with the fact that
ultimately
16 the Frank statement was put out and then an
organization
17 was created called CTR, correct?
18 A. Correct.
19 Q. The Frank statement makes a bunch of
commitments
20 about appointing a scientific director, having a
board of
21 disinterested scientists. Do you see that in
paragraph
22 three?
23 A. Yes.
24 Q. A group of disinterested men from
medicine, science,
25 and education will be invited to serve?

1082

1 A. I see that, yes.
2 Q. You have never actually become familiar
with who
3 those scientists were, either the director or
any of the
4 members of the scientific advisory board?
5 A. That's correct.
6 Q. You have never read a single bit of
research that's
7 coming out of this effort.
8 A. That's correct.
9 Q. You have never talked to anybody about the

quality of
you? 10 the research that actually came out of CTR, have
11 A. That's correct.
12 Q. You were shown the 1958 Trip report by the
key people
13 from the CTR?
14 A. Yes, sir.
15 Q. Have you ever been shown the documents
that were
16 written, the minutes that were written by other
people who
17 attended the same meetings to find out what they
said about
18 the meetings?
19 A. No, not that I recall.
20 MR. COUGHLIN: There was an
objection when I
21 put that document up.
22 THE COURT: Are you opening up that
whole
23 report?
24 MR. BERNICK: I'm only asking the
scope of what
25 he's.

1083
you want to 1 THE COURT: I'm cautioning you if
2 open up all these documents; you earlier raised
an
3 objection as to going into any of them.
4 BY MR. BERNICK:
5 Q. Mr. LeBow, isn't it a fact you can't make
any
6 representation to this court that you have seen
what even
7 begins to be the full picture of the documents
that relate
8 to the claims that are made against the rest of
the
9 industry?
10 A. Personally, I have not, but other people
in my
11 organization and my attorneys have.
12 Q. You are still manufacturing cigarettes,
Mr. LeBow?
13 A. Yes.
14 Q. You have shown the jury the fact that you
have a new
15 labeling on the cigarette packs, correct?
16 A. Correct.
17 Q. Isn't it true that you --
18 A. A new warning, not a label.
19 Q. A warning, and that warning was something
that you
20 agreed to do back in 1997?
21 A. And gladly agreed to it.
22 Q. And you said that, if I understand
correctly, that
23 you agreed to put that on all the cigarettes
that you made,
24 correct?

25 A. That's correct.

1084

1 Q. Isn't it a fact that as of 1998, there
were still
2 cigarettes that were being distributed by,
manufactured by
3 Liggett, manufactured by Liggett, were being
sold in packs
4 that didn't have that warning?

5 A. Early '98 some of them. As of now, all
cigarettes
6 that are manufactured by Liggett has the warning
on it.

7 Q. Even after the settlement agreement, there
are still
8 manufactured Liggett cigarettes being sold
without that
9 warning?

10 MR. COUGHLIN: Object, asked and
answered.

11 THE COURT: Sustained.

12 BY MR. BERNICK:

13 Q. Do you believe the manufacture and sale of
cigarettes
14 in this country is legal?

15 A. Yes.

16 Q. And isn't it true, because the manufacture
and sale
17 of cigarettes is legal in this country, you
don't really
18 care about whether smoking causes lung disease;
isn't that

19 your view?

20 A. No, that's not my view.

21 Q. Were you asked these questions and did you
give these
22 answers back in 1993 in connection with your
deposition?

23 A. Yes.

24 Q. Question by Mr. Rosenblatt: If I ask you,
does
25 smoking cause lung cancer?

1085

1 Answer: I don't know.

2 Question: And you really don't
care.

3 There is an objection.

4 And you really don't care because
you are

5 selling a legal product?

6 Answer: Correct.

7 Was that question asked of you and
did you give
8 that testimony in the Broin case?

9 A. Back in 1993 that was the same party
lines, so to

10 speak. And I did give that answer, yes.

11 Q. Now, you have talked about the party line
repeatedly
12 during your direct examination, now during
cross, as being

tobacco 13 the party line of the rest of the people in the
14 industry; do you recall that?
yes. 15 A. As advised by my attorneys at the time,
16 Q. And isn't it true that the line -- you
have now 17 spoken to the party line, you have now spoken to
every time 18 that you have testified from 1997 going forward
is a new 19 party line. It's the party line of people who
are suing 20 the tobacco industry, Mr. LeBow?
and 21 A. No, it's a party line of the Liggett group
else's. 22 myself. That's the party line it is. No one
Honor. 23 MR. BERNICK: Nothing further, your
24 THE COURT: Do you have any
redirect? 25 REDIRECT EXAMINATION

1086
1 BY MR. COUGHLIN:
2 Q. Very briefly, your Honor. You talked
about a number 3 of years as your market share was going down; do
you 4 remember that?
5 A. Yes.
6 Q. Now, during these years you were still
advertising in 7 national magazines that were being mailed to
every 8 household in the country; is that right?
9 A. '91, '92 we were, yes.
10 Q. And now, were you doing any sampling
mailings during 11 this time period, things like that?
12 A. What do you mean sampling mailings.
13 Q. Were you selling cigarettes through the
mail? 14 A. I don't recall. I mean, I just don't know
the 15 details of that.
16 Q. Did you have any promotional items?
17 A. Through the mails, yes.
18 Q. And did you have an understanding what
your brand, 19 that if you didn't get any of the children's
market, that 20 you would be out of business in 25 years?
21 A. I made that statement publicly many times.
And I 22 hope we are out of the business in 25 years. If
you are 23 not selling to children, you should be out of
business. 24 You have no customers left.
25 MR. COUGHLIN: Nothing further.

1087

1 THE COURT: Thank you, Mr. LeBow.
2 Do you have any interim argument,
Mr. Coughlin?
3 MR. COUGHLIN: No, your Honor.
4 THE COURT: Does the defendant?
5 MR. BERNICK: Yes.
6 THE COURT: Mr. Coughlin, you have
the
7 opportunity to go first.
8 And again, this is the opportunity
for the
9 attorneys to comment on the testimony, but it
is not
10 evidence in itself.
11 MR. COUGHLIN: Ladies and gentlemen
of the
12 jury, now you have seen somebody that was
within the
13 industry when they undertook the investigation
to find out
14 what the facts were, and you had him explain,
and you can
15 judge his own credibility about what he had to
say, when
16 he had to say it, and what the admissions were.
This is
17 an industry that has denied these things for
all of these
18 years, for a couple of reasons. But paramount
in that
19 reason is not because of health, but to sell
their
20 product.
21 And you heard Mr. LeBow, unless they
target
22 children they will be out of business in 25
years. That
23 was the same back in the 60's and '70's; that's
the
24 market, that's what this case is about, that's
what these
25 defendants had done.

1088

1 They deny causation, they deny
addiction, and
2 they targeted children, and they have done it
through the
3 mails. It's wrong, it's illegal, and that's
what this
4 case is about.
5 Thank you.
6 MR. BERNICK: I agree with Mr.
Coughlin, the
7 issue here is credibility. Every time a
witness takes the
8 stand you will have the opportunity to gauge
the
9 credibility of the witness, the arguments
that's been
10 proffered, or the evidence that's being
proffered with the

11 witness.
12 This witness was being proffered to
establish
13 this significant change, this heartfelt change
by this man
14 who became involved in the tobacco business.
15 But what is the credibility of what
was offered
16 by way of that testimony? What's the
credibility of the
17 heartfelt change? Was it an informed decision,
informed
18 by new knowledge?
19 You heard him testify he never read
a document
20 at the time that he made that decision. He
never talked
21 to a scientist at the time he made that
decision. It was
22 an informed decision. It was informed by one
thing, and
23 one thing only, which is that Mr. LeBow always
has been
24 interested in making money as a strategic owner
of the
25 companies he buys. That's what drove that
change.

1089

1 And they proffered him to the stand
on a very
2 different theory. Let's deal with the reality
of what Mr.
3 LeBow is all about.
4 THE COURT: Would the plaintiff call
your next
5 witness?
6 MR. COUGHLIN: We will, your Honor.
7 MR. ADELMAN: Michael Murphy,
please.
8 MICHAEL MURPHY
9 called as a witness by and on behalf of the
Plaintiff,
10 being first duly sworn, was examined and
testified as
11 follows:
12 THE COURT: Would you state your
name and spell
13 your last name for us?
14 THE WITNESS: Michael Murphy,
M-U-R-P-H-Y.
15 BY MR. ADELMAN:
16 Q. Good morning, ladies and gentlemen.
17 Q. Good morning Mr. Murphy?
18 A. Good morning.
19 Q. After you get your water supply I have a
few
20 questions?
21 A. Go ahead.
22 Q. All right, sir, if I may, your Honor?
23 THE COURT: Mr. Adelman.
24 BY MR. ADELMAN:
25 Q. How are you employed?

1090

1 A. I'm employed by Service Employees
International Union
2 Local 47.
3 Q. Where is that located?
4 A. Cleveland, Ohio.
5 Q. What was your position with the union?
6 A. President.
7 Q. How long have you been President?
8 A. January of 1990.
9 Q. Were you elected to that position?
10 A. Yes, I was.
11 Q. How many times?
12 A. Elected once, re-elected three additional
times.
13 Q. Now, does that union have a Taft Hartley
Health and
14 Welfare Fund?
15 A. Yes, we do.
16 Q. How is that fund denominated or known in
the union?
17 A. Building Service Pension Funds and
Building Service
18 Taft Hartley Fund.
19 Q. Is that called Trust Fund Number 1?
20 A. Yes, Trust Fund Number 1.
21 Q. How long have you been a member of the
union?
22 A. Joined the union in 1978.
23 Q. How long have you been employed by the
union?
24 A. 1976, May.
25 Q. What is your position as a union employee?

1091

1 A. Currently?
2 Q. Well, from 1976?
3 A. I started as an organizer for the first
the two
4 years, I then went into a business
representative, and then
5 became secretary treasurer, and then after
secretary
6 treasurer was elected President.
7 Q. Now, let me direct your attention to the
Taft Hartley
8 Fund. Do you have any role or title or position
in that
9 fund?
10 A. I serve as trustee.
11 Q. How long have you served as a trustee?
12 A. I've served as a trustee since 1980.
13 Q. I would like you to inform the jury a
little about
14 the participants in that fund. First of all,
how many
15 participants are there at this time?
16 A. There are one thousand participants in the
funds.
17 Q. Does that include active participants and
retiree?
18 A. Correct, both.

active 19 Q. Do you have an approximation of how many
20 participants there are?
21 A. Approximately, 700 active, 300 retiree.
members of 22 Q. What are the trades and occupations and
23 the this fund, participants of this fund engage
in?
24 A. Primarily in three industries; the
building service 25 industry, which is predominantly janitors; the
hotel

1092
1 industry; and window cleaning industry.
2 Q. Has that been true all the years you have
been a 3 trustee?
4 A. At one time they were separate plans; they
are now 5 merged into one plan.
6 Q. And we'll call that Trust fund Number 1?
7 A. Trust Fund Number 1.
8 Q. Now, is this a Taft Hartley Fund?
9 A. Yes.
10 Q. With respect to the nature of the
employment, the 11 work that is done by your members, can you tell
the jury a 12 little bit about their mobility, in terms of
whether they 13 have different employers over time?
14 A. Especially in the janitorial industry they
work at a 15 specific building. It's not uncommon if they
leave 16 employment to go to another -- to stay in the
industry to 17 go to another building which may or may not be
the same 18 employer. But what is more common, the
janitorial 19 companies will lose the job, the workers stay in
the 20 specific accounts they work at.
21 Q. So by being in Fund Number 1, even though
there is a 22 change in ownership for instance, they still can
continue 23 health care?
24 A. There is continuity of health care
coverage by virtue 25 of them remaining in the Taft Hartley funds.

1093
1 Q. Do you have the various levels of benefits
that you 2 provide to members, participants in the funds?
3 A. Yes we have three levels of benefits.
4 Q. Why do you have three levels?
5 A. It's driven by contribution rate from the
employers 6 in the industry, or it is driven by date of

hire.

7 Q. What do you mean by date of hire as being
a factor?

8 A. Those that were hired pre, and there are
two

9 different dates. May, I believe it is, of '85,
and May of

10 '86 get what I call the higher level of
benefits, and those

11 hired after that get a lower level of benefits.

12 Q. You mentioned lower level of benefits.
Let me just

13 ask you this question. With respect to, for
instance, to

14 the lower tiers, 2 and 3, are you able to extend
at this

15 time medical benefits to the dependents of your
16 participants?

17 A. No, we are not.

18 Q. Why is that?

19 A. We just don't have the resources; it's the
nature of

20 that industry.

21 Q. What do you mean by that?

22 A. Well, it's a janitorial industry, you are
competing

23 in a predominantly minimum wage, low, low paying
market, so

24 you get the benefits but not as many. So it's
restricted

25 by the Collective Bargaining Agreement.

1094

1 Q. Can you tell us what the present financial
status of

2 Fund Number 1 is?

3 A. Right now we are building our reserves. I
think we

4 are currently at about 1.2 million reserves.
This fund

5 clearly is not able to provide the lower tier
with the same

6 benefits as the upper.

7 Q. You intend to increase the Fund's
reserves?

8 A. Yes, we intend to increase the reserves
and slide the

9 lower tiered people on to the upper tiered
level.

10 Q. Looking at the time you have been a
trustee, can you

11 tell us generally, without details, from year to
year, what

12 the status of the fund was from 1980 forward?

13 A. Well, in the latter period of time I was a
business

14 agent before trustee, so in the latter 70's,
early 80's

15 this industry was shrinking, and the percentage
of the

16 market was not unionized, we lost a good chunk
of the

17 market in the 1980's. We were in a rebuilding

phase,

18 reorganizing new facilities.

19 And in 1985 we went through a nine
month battle

20 and came out two tiered, that's why you ended
up with that

21 lower tier of benefits.

22 Q. I take it the purpose of the lower tiers
is to insure

23 that members at least have some coverage
themselves as you

24 go forward, is that correct?

25 A. Correct.

1095

1 Q. What's the other option to providing
limited coverage

2 for those lower tiered members?

3 A. What other option? What types of
benefits?

4 Q. Well, that was not a good question. Let
me put it to

5 you directly.

6 If you didn't provide those limited
benefits,

7 these folks wouldn't get any at all?

8 A. No, they would get nothing.

9 Q. So that's the way you divided the pot?

10 A. Correct.

11 Q. Now, you have been a trustee since 1980,
correct?

12 A. That's correct.

13 Q. How many trustees are there presently?

14 A. Eight trustees.

15 Q. And that's for Fund Number 1?

16 A. That's for Fund Number 1.

17 Q. And are there four labor and management?

18 A. That's correct.

19 Q. And you are one of the labor trustees?

20 A. That's correct.

21 Q. Who are the other labor trustees?

22 A. By name? Dennis Dingow, Cheryl Delauer,
Mark Davis.

23 Q. How is it that you sit as a trustee at
this time?

24 A. I sit as a trustee by virtue of my
election as

25 President.

1096

1 Q. How are the other labor trustees put in
their

2 positions?

3 A. They are appointed by me.

4 Q. Do you know how the employer trustees are
put in

5 their position?

6 A. They are selected through their
association.

7 Q. But labor side has nothing to do with
their

8 participation?

9 A. Absolutely nothing to do with it. No.

10 Q. How frequently do you meet?
11 A. Quarterly.
12 Q. With respect to your management of
important
have a vote
13 decisions, by what number of trustees must you
14 in order to take an important step?
15 A. Six out of eight.
16 Q. Are you paid for your service, sir?
17 A. No, I am not. I'm not paid as a trustee,
I'm
18 obviously paid as President of the local.
19 Q. Any of the other trustees paid, to your
knowledge?
20 A. No.
21 Q. You are sitting as a trustee on the labor
side, is
22 that correct?
23 A. That's correct.
24 Q. Do you consult with your members, your
participants
25 in the Fund? Are those your duties and
obligations?

1097
1 A. You'll consult with them if they come to
the office;
2 it's usually a coverage problem. You don't give
a
3 day-to-day report on what you are doing with the
funds,
4 that's usually the bargaining process.
5 Q. With respect to the benefits the Fund
provides, is
6 there any differential based on the
participants?
7 A. No.
8 Q. Is the fund, in your view, an insurer?
9 A. No, the fund is not an insurance company.
We cover
10 those people that are covered under the
bargaining
11 agreement once they become eligible.
12 Q. Do you have any choice with respect to
whether you
13 reject or accept people who participate in the
fund?
14 A. No. Once they meet the eligibility they
are covered
15 under the fund.
16 Q. You are a trust fund?
17 A. Trust fund, correct.
18 Q. What does that mean, sir?
19 A. What is a trust fund?
20 Q. What does it mean to you and your
obligations as a
21 trustee?
22 A. You have an obligation, a legal
obligation. You are
23 there to serve in the best interest of the
participants.
24 Whether you are a union trustee or whether you
are an

25 employer trustee, you are there solely for the
benefit of

1098

1 the employees participating in that plan.
2 Q. What is the source or sources of income
for a Fund
3 Number 1?
4 A. It's derived by the collective bargaining
agreements
5 and investment income.
6 Q. How frequently is collective bargaining
undertaken
7 with respect to contributions by the employer to
the funds?
8 A. It's runs in cycles of three to four
years.
9 Q. You participate in that yourself?
10 A. I participate in the bulk of them, yes.
11 Q. Does the fund at this point receive any
income from
12 investments?
13 A. Yes, we do.
14 Q. Has that always been the case?
15 A. They have always either been cash or short
term bonds
16 because we just haven't had enough money to
invest anywhere
17 else.
18 Q. Has the fund always had investments, to
your
19 knowledge?
20 A. In short term bonds I believe they have.
21 Q. Have they been significant in terms of
dollars, to
22 your knowledge?
23 A. No, no, the assets of those funds were
pretty low at
24 one period of time.
25 Q. Now what is the basis or bases for the
disposition of

1099

1 these funds by the trustees? What controls what
you do?
2 A. ERISA, Early Retirement Income Security
Act, it's
3 federal law.
4 Q. Law?
5 A. The law.
6 Q. So you are governed by legal standards
that apply to
7 your fund and your service, is that correct?
8 A. You are there, again, for the sole purpose
of
9 providing benefits to the participants.
10 Q. Now, in the course of making decisions
about
11 important fund matters do you rely on people
other than
12 your fellow trustees?
13 A. Yes, we hire professional advisors.
14 Q. And who are those people, first by

category and then

15 by name?

16 A. Legal counsel it's Mel Schwartzwald and
Maureen

17 Robinson. The administrator, the one who
collects the

18 money and checks eligibility is Donald Wall and
Associates.

19 The accountant is a gentlemen named Chuck Drake.
The

20 auditor is Jen Rothschild. And the actuaries
and advisors

21 are Wyatt & Watson.

22 Q. Do you, sir, as a general matter, review,
examine,

23 digest the information that the professional
advisors

24 gather in the course of their duties to help
you?

25 A. If I request that information, correct.

1100

1 Q. Do you do that?

2 A. Periodically.

3 Q. Well, my question really was, do you do it
on a

4 regular basis?

5 A. Again, it depends what's on the agenda.
Sometimes we

6 will, sometimes we don't.

7 Q. Maybe I should put it to you this way.
Outside of

8 the meetings that you have four times a year or
so, do you

9 go and read all the data?

10 A. No, no. No, I do not.

11 Q. Or the lawyers or the other advisors?

12 A. No, when I'm not in those trustees
meetings I have a

13 local union to run, that's my primary function.

14 Q. For sure. Then you tend to rely rather
extensively

15 on what the professionals tell you on various
subjects, is

16 that correct?

17 A. That's correct.

18 Q. Now, does the fund currently provide
coverage for

19 smoking cessation?

20 A. No, we do not.

21 Q. And why is that, sir?

22 A. We are trying to build a reserves and at
the same

23 time increase the employer contributions so that
ultimately

24 we can get that lower tier to the upper tier
benefits; we

25 can get them health care benefits. And again
our

1101

1 responsibility is to all the participants.

2 Q. In other words, you don't have the money,

is that

3 what you are saying?

4 A. No, we don't have the money.

5 Q. However, has the fund taken any recent
action with

6 respect to smoking cessation programs?

7 A. In November, at the trustees meeting, what
we did is,

8 because we finally got a reserve, we looked at
increasing

9 benefits. And part of the discussion in that
was smoking

10 cessation. We also discussed for the first time
family

11 dental benefits, which is new to all these
workers.

12 We decided to go with family dental
benefits

13 because everybody will benefit from that. On
smoking

14 cessation, the trustees entertained and adopted
a motion

15 that if we realize any proceeds from this
litigation, part

16 of that money will be used for smoking
cessation, part of

17 it will be used for behavior modification to
educate the

18 smokers, and part of it will be used to
increase the

19 overall benefits of the participants.

20 Q. Prior to November, 1988 when that
resolution was put

21 forward, had you or your other trustees
considered and

22 discussed the matter of the smoking cessation
program?

23 A. I think we first brought it up at the
April trustees

24 meetings; April, 1988.

25 Q. Was any action taken then in the form of a

1102

1 resolution?

2 A. At that meeting we instructed Don Wall,
who again is

3 the administrator of the fund, to start looking
into again

4 increasing benefits, and part of that was
smoking

5 cessation.

6 Q. As a general matter, with respect to the
matter of

7 smoking and health and smoking cessation, from
whom do you

8 draw your expert information?

9 A. The expert information would be from Wyatt
& Watson.

10 Q. And again, for the jury, who is --

11 A. That is the actuaries.

12 Q. Why is it, again, sir, that the fund has
not actually

13 instituted a smoking cessation program?

14 A. We don't have the contribution level or
the reserves.
15 Again, our primary function is to increase the
employer
16 contributions. And between that and a
combination of
17 reserves to get these people who were hired
after '85 and
18 '86 to get them their medical benefits.
19 Q. And then what, sir, would you do if the
money is
20 recovered as a result of this lawsuit?
21 A. Part of that would be used to, again,
increase level
22 of benefits, and part of it would be discussed
for smoking
23 cessation. And as I understand it, if it's
going to be
24 successful, that requires an education
component, behavior
25 modification.

1103

1 Q. Would you be able with part of that money
to extend
2 medical coverage to lower tier dependents?
3 A. That's possible, depending on what that
dollar value
4 is.
5 Q. Any of the funds you recover go directly
to the
6 union?
7 A. No, that's illegal, you can't do that.
8 Q. Will any of those funds go directly to the
employer?
9 A. That's also illegal.
10 Q. Or employers, I should say?
11 A. One or all, it's still illegal.
12 Q. Will any of those funds go directly to the
employees?
13 A. Those monies must be used for the sole
purpose of
14 providing benefits through the Taft Hartley
Fund.
15 Q. So the answer to my question is whether
any of those
16 funds go directly to the employees, the answer
is no?

17 A. That's correct.
18 MR. ADELMAN: That's all I have,
your Honor.

19 THE COURT: Cross examination.
20 Mr. Long.

21 CROSS EXAMINATION
22 BY MR. LONG:
23 Q. Good morning, Mr. Murphy. My name is Gary
Long. I
24 represent one of the defendants, Lorillard, and
I'll be
25 asking you some questions this morning.

1104

1 Good morning ladies and gentlemen of

the jury.

2 A. Good morning.

3 Q. Mr. Murphy, I'm going to go back just for
a minute to

4 the membership of the fund. I think you
testified that --

5 well, first of all, how many members are in the
union

6 itself?

7 A. There are eight thousand members in the
local union.

8 Q. And of those eight thousand, approximately
how many

9 active workers are in the fund, members of the
fund itself?

10 Did you say about 700?

11 A. Active would be 700, correct.

12 Q. Okay. And of those, how many does the
fund itself

13 directly pay benefits for as opposed to having
insurance

14 through a third party?

15 A. Insurance through a third party would just
be the

16 window cleaners, which is approximately, I
believe, 50, and

17 I think about 40 hotel workers. The rest would
all be

18 self-insured.

19 Q. So the fund actually has responsibility
for direct

20 coverage payments for about 600 of the active
members?

21 A. That's correct.

22 Q. And I didn't quite understand, on the
lower tier

23 members, do the members themselves have medical
and

24 hospitalization coverage?

25 A. At this moment, no.

1105

1 Q. Well, how long has it been since they have
had

2 medical coverage?

3 A. The lower tier have, as a group of
employees they

4 haven't had it.

5 Q. And how long has that been?

6 A. That's been since '85 or '86.

7 Q. And how many members are in that lower
tier?

8 A. That lower tier is approximately 600.

9 Q. So is it accurate to say, then, that the
fund itself

10 has only been paying medical benefits for
approximately 100

11 active members for the last 10 years?

12 A. I think it's about 150, but begin on the
others there

13 is some, there is optical, there is drug, there
is now

14 dental, there is life, there is lost time. We

just don't
15 have the resources to pay the medical.
16 Q. I understand Mr. Murphy. What I'm talking
about are
17 the type of expenses at issue here, medical and
18 hospitalizations expenses.
19 Out of all the of members of the
fund. Is it
20 accurate that at most in the last 10 years the
fund itself
21 has been providing medical coverage,
hospitalization,
22 doctor bills for only about 150 fund members?
23 A. Right now it's about 15 percent. But
again, the
24 further out you get from that date, I mean
that's -- the
25 one number is shrinking and the other number is
growing.

1106
1 Q. But if you look at the last 10 years,
let's say you
2 have got an average of what, 150 fund members
that the fund
3 has been directly providing medical coverage
for?
4 A. It's 150 now, and without the documents,
the loss --
5 it has declined over the last ten years, I
couldn't tell
6 you what it was in each year.
7 Q. And for the last ten years at least those
-- of the
8 beneficiaries, those 150, those are the members
for which
9 you are seeking compensation in terms of medical
expenses
10 you paid for them, is that correct?
11 A. Well, no, it would be all participants.
12 Q. In the last ten years, though, you haven't
paid
13 medical coverage for all participants, correct?
14 A. But, there is medical illnesses that we
have paid for
15 that may be attributed to smoking illnesses. If
we didn't
16 expend those monies over the last four years our
reserves
17 would be higher. And maybe we couldn't get
everybody to
18 the upper tier, but maybe we could move that
date from '86
19 to '96 and cover a very large block of people.
You are not
20 just looking at the one year, you are looking at
40 to 50
21 year history.
22 Q. I'm sorry, I guess was wasn't clear. I'm
focusing on
23 the last 10 years.
24 The last ten years, the only out of
pocket

25 money that the fund has spent on medical
expenses that

1107

1 could be related to tobacco illnesses would be
on this

2 group of about 150 active members, is that
correct?

3 MR. ADELMAN: Objection, asked and
answered.

4 THE COURT: Overruled.

5 A. For medical expenses, correct? Although
some of the

6 many of the drug related expenses could be due
to smoking

7 related illnesses.

8 Q. Of these 150 members, participants, in the
last ten

9 years whose medical coverage, hospitalization
you have

10 paid, exactly how many of those have been
smokers in the

11 last ten years?

12 A. I don't know.

13 Q. If you don't know how many have been
smokers, I

14 assume you don't know how many of those specific
members,

15 those 150, then could have possibly had diseases
related to

16 smoking, do you?

17 MR. ADELMAN: Your Honor, objection
as to

18 relevance in point in the case.

19 THE COURT: Overruled.

20 THE WITNESS: I would rely on the
medical

21 experts to answer that. I'm not in a position
to testify

22 to that.

23 Q. So the answer to the question is, you as a
trustee

24 don't know?

25 A. I would only know to the general extent
the public

1108

1 smokes or the members, you see members in
meetings, you see

2 how many go outside to smoke, you see how many
come in

3 smoking. But a specific number, no, I couldn't
testify to

4 that.

5 Q. So the trust didn't send out a survey to
these 150

6 participants to get this information for this
lawsuit?

7 A. I don't know. I don't think a survey of
this fund

8 would serve any useful purpose.

9 Q. Does that mean you did not search out a
survey?

10 A. That means I did not.
11 Q. And you made no attempt to get information
from these
12 150 participants in terms of their smoking
histories or
13 their medical expenses, correct?
14 A. No, I have not.
15 Q. And I assume you have made no attempt to
determine
16 the awareness of the risk of smoking of these
150
17 participants over the last ten years, have you?
18 A. Again, no, I have not. But I don't know
what their
19 awareness, how that would relate to the expenses
of the
20 funding curve for smoking related illnesses.
21 Q. You were talking about your fiduciary
obligations as
22 a trustee, Mr. Murphy. Do you as a trustee have
a
23 fiduciary obligation to keep your membership
informed of
24 the health risk of smoking?
25 A. Because of our limited resources, any
advice they get

1109
1 on smoking and the hazards of smoking we got to
rely on the
2 medical profession that we pay to educate the
participants.
3 Q. Again, I'm not clear. I wasn't talking
about your
4 economic situation, I was talking about your
fiduciary
5 obligation. Do you feel as a trustee you have a
fiduciary
6 obligation to inform your memberships of health
risks, such
7 as the health risk of smoking?
8 A. We have an organization that's obligated
to obtain
9 the highest level of benefits for all those in
the Fund
10 with. If we take that money that we do have and
we don't
11 do anything for the benefit of those who don't
smoke, it
12 doesn't make any sense to circulate that data.
And there
13 is nothing we could do if we collected it.
14 We also know from doing contract
surveys we do
15 throughout the union, if you get back 40
percent, you have
16 got a real good response. So even if I did a
survey, it
17 would be a waste of resources. I have nothing
to do with
18 it once I have that data. I wouldn't do it for
weight
19 problems. I wouldn't do it for drinking

problems. I have
20 nowhere to go to it if we obtain that data.
21 Q. I'm going back to my question.
22 Do you as a trustee feel you have a
fiduciary
23 obligation to inform your membership as to the
health risk
24 of smoking?
25 MR. ADELMAN: Objection, your Honor.
Asked and

1110
1 answered.
2 THE COURT: Sustained. I think you
just asked
3 it and he said he doesn't get enough response
to justify
4 that.
5 Q. Isn't it true, Mr. Murphy, that for the
last several
6 years you as a trustee have had a hunch that a
large
7 percentage of the medical claims paid by the
trust have
8 been for smoking related illnesses?
9 A. I would have to believe as a trustee that
certain
10 percentage of the lung problems and heart
problems are
11 obtained directly through related to cigarette
smoking.
12 Q. And you have held that view or had that
opinion nor
13 several years, haven't you?
14 A. Again, you ask me as a personal opinion,
because as a
15 professional -- I'm not a health care
professional and I
16 couldn't testify as a personal opinion. I
believe smoking
17 has caused a lot of illnesses yes.
18 Q. As a trustee, you have believed for
several years
19 that a large percentage of your medical expenses
are due to
20 smoking related illnesses, correct?
21 A. I would agree with that statement.
22 Q. I mean, given this belief that you have
had, what
23 efforts has the fund made over the years to
learn about the
24 health risk of smoking and the specific impact
of those
25 risk on the fund?

1111
1 A. Again, as a trustee I think obesity is a
very serious
2 problem. I don't have the resources to spend
time, nor am
3 I a professional, to study obesity. If I had
the resources
4 then I would go to our professionals and say:

If we
and sugar
-- and I'm
had the
though you
the fund
the health
those risks;
highest level
research -- I
the effects
mentioned
inform your
that correct?
predominantly by
your

5 tackled obesity we might lower blood pressure
6 related problems. If we did smoking cessation
7 not sure smoking cessation works yet -- if we
8 resources I would then go down that road.
9 Q. Is the answer to my question that even
10 have held the belief for some time, as a trustee
11 has made no specific efforts to learn more about
12 risk of smoking and the impact to the fund of
13 is that the answer?
14 A. Again, my obligation is to provide the
15 of benefits for the money I have, not to
16 leave that to professionals -- not to research
17 of medical illnesses.
18 Q. And you haven't done that then?
19 A. Have I done that? No.
20 Q. Does the fund have an obligation -- you
21 earlier, it is not the fund's obligation to
22 membership of the health risk of smoking, is
23 A. Again, that decision is driven
24 resources. We don't have the money to do that.
25 Q. Do you leave that up, the education of

1112

1 membership about the health risk of life
including smoking,
2 does the fund leave that up to health care
professionals?
3 A. Correct.
4 Q. And it's your personal belief that for
quite some
5 time the health care professionals, your members
have been
6 seeing doctors, people in hospitals, they have
been
7 informing the membership of the health risk of
smoking?
8 A. I believe some have, yes.
9 Q. Mr. Murphy, are the designated
spokesperson or person
10 in charge of the litigation for the fund --
11 MR. ADELMAN: Objection, relevance,
your Honor.
12 THE COURT: Sustained.
13 THE WITNESS: Are you talking --
14 THE COURT: You don't answer when I
sustained.
15 THE WITNESS: I'm sorry, I heard

you. I

16 apologize.

17 BY MR. LONG:

18 Q. Mr. Murphy, are you familiar with the
interrogatories

19 that the defendants have served in this case and
that your

20 fund has answered?

21 A. Somewhat, yes.

22 Q. I would like to show you some of those.

These are

23 the responses of your fund Local 47, Fund Number
1 to

24 interrogatories?

25 A. Yes.

1113

1 Q. By the way, there is a booklet up there
somewhere, if

2 you want to refer to it, or you can just look on
the

3 screen?

4 A. I'll try to read the screen.

5 Q. Okay. Now I want to ask you about this
specific

6 answer here. Can you read that, sir?

7 A. Yes.

8 Q. I think we both have the same problem,
these glasses

9 and televisions at certain distances don't
exactly hook up.

10 At any rate, in your answer to interrogatory
number 14 it

11 states, the funds rely upon physicians to
provide direct

12 health care advice regarding use of tobacco
products to

13 participant beneficiaries, and the funds pay for
this

14 advice.

15 In this sense, the Funds make
efforts to

16 provide tobacco health care information to the
Fund

17 participants/beneficiaries. The Fund is not
licienced or

18 able to practice medicine but relies upon its
medical

19 consultants, the beneficiearies and treating
physicians to

20 maximize participants/benificiary health.

21 Q. That response, is that what your fund
does? And it

22 simply looks to the health care chain to handle
the health

23 risk discussions for the beneficiaries?

24 A. I would say that's correct.

25 Q. At the bottom of this page there begins a

1114

1 supplemental answer to that same interrogatory
that

2 continues on the next page.

3 It says, other than as stated in the
previous
4 interrogatories, the class representative funds
do not
5 "direct, advise, or control" information
provided to
6 participants or beneficiaries by medical care
providers.
7 It goes on to say, states, however, on occasion
the
8 trustees do "monitor" information provided to
9 beneficiaries regarding the use of tobacco and
its health
10 effects. The trustees do this, where
applicable, simply
11 as a by-product of their being covered by the
same health
12 care plans as the beneficiaries.
13 They do this by the fact that they
go to the
14 health care providers and observe the efforts
undertaken
15 by these health care providers to provide
information to
16 their patients on the health risk of smoking.
17 I'm not sure exactly what this
means. Do you
18 understand this to mean that what the fund does
is that
19 since the --
20 A. Can you move that down so I could see the
top half of
21 it.
22 Q. I'm sorry?
23 A. Thank you. I'm sorry. Could you ask your
question,
24 please?
25 Q. What I'm focusing on is this portion in
the middle

1115
1 where it says the fund monitors the health care
information
2 given to fund members. Basically I guess it
says, because
3 some, some of the trustees may go to the same
doctors as
4 the fund members.
5 You see what I'm talking about?
It's the
6 second full sentence beginning --
7 THE COURT: What's the question?
8 MR. LOMBARDI: The question is in
terms of the
9 second full sentence where it says the trustees
do this,
10 meaning monitor where applicable simply as
by-product of
11 their being covered by the same health care
plans as their
12 beneficiaries.
13 A. If you would ask your question, is that
the way the

14 trustees monitor the information given to the
beneficiaries
15 by the mere fact they may go to the same doctors
that the
16 beneficiaries go to?
17 A. The trustees don't monitor that
information. The
18 trustees paid the benefit for their people that
go to the
19 physicians, and the physicians give them that
advice. We
20 don't monitor the advice that the physician
gives them.
21 Q. The trustee doesn't concern itself what
advice the
22 physician is given to the membership? It does
not monitor
23 that?
24 A. No, we do not monitor that.
25 Q. Now, outside of what the medical
profession has done,

1116

1 the fund has given no written information to the
membership
2 about the health risk of smoking?
3 A. Again, we don't have the resources to
distribute that
4 information.
5 Q. And outside of what the health care
providers do, the
6 fund hasn't attempted to hold any meetings or
seminars
7 about the health risk of smoking?
8 A. Again, other than the motion, if we
realize any
9 monetary settlement in this we'll then use part
of that
10 settlement for purposes of smoking cessation and
behavior
11 modification.
12 Q. Has the membership of the fund been
informed about
13 this lawsuit by the trustees?
14 MR. ADELMAN: Objection, relevance,
your Honor.
15 THE COURT: Sustained.
16 BY MR. LONG:
17 Q. Now, you are President of the union?
18 A. Local 47.
19 Q. Local 47. Now is the union hall for that
union, is
20 that a smoke free building?
21 A. Generally. It just became smoke free in
February,
22 the office areas. Generally in the hall we'll
take a vote
23 of the members if somebody objects to smoking.
But I can
24 tell you the majority of smokers will leave the
building
25 and go out front.

1117

1 Q. You said February, that's this month?
2 A. Yes.
3 Q. So until this month it was not a smoke
free building?
4 A. No, there was actually no official policy,
just --
5 Q. Now, you are aware, are you not, that the
national
6 union of service employees sends a newsletter to
the
7 beneficiaries -- excuse me, to the union members
called
8 service employees?
9 A. Could you show me the newsletter you are
referring
10 to.
11 Q. Yes, sir. If you look, there is a
notebook up there
12 that I believe has your name on it. It's a
black notebook.
13 A. Got it.
14 Q. Okay. And I believe if you look and there
should be
15 some tabs, should be an exhibit, for example Tab
GZ 00212?
16 A. Got it.
17 Q. And is there a cover sheet there for a
newsletter
18 called service employee?
19 A. Yes, there is.
20 Q. And is that put out by the National
Service Employees
21 Union?
22 A. Yes, it is. Yes, it was.
23 Q. It's no longer published?
24 A. It's changed a number of times.
25 Q. Okay. Now, and you have been a members of
the union

1118

1 since 1968?
2 A. Since 1968.
3 Q. Have you received those publications?
4 A. I believe these publications were sent to
the
5 officers, executive board, and the staff of the
union.
6 Q. Do you know whether or not just a regular
every day
7 member of the union got this type of
information?
8 A. I don't believe that this was, because of
the ones
9 that came to the members that are the leadership
they
10 mailed to the office, so I don't believe that it
went to
11 members only, no.
12 Q. Do you have any way of knowing one way or
the other
13 whether they didn't?
14 A. Sitting here today, no.

15 Q. Okay. Now the union, you have received
this. Have
16 you seen, when you have received this,
information in here
17 that the union is providing about smoking and
health
18 issues?
19 MR. ADELMAN: Just point of
clarification. Is
20 he asking whether this witness has received it
or the
21 union?
22 THE COURT: I think he's asked that
question
23 and it's been answered.
24 MR. LONG: I'm just asking him if he
recalls
25 seeing smoking and health information in the
publications

1119

1 you receive from the union.
2 A. Do I recall seeing these specific issues
and what was
3 in them? No, I don't.
4 Q. Okay. If you will turn, please, to that
document GZ
5 00212, please?
6 A. Okay.
7 Q. And if you look about four panels back
into that
8 document, I think there is a May, 1974 service
employee
9 publication cover sheet?
10 A. Yes.
11 Q. And if you turn to the next page, and I
want to focus
12 your attention to what was in this publication
that was
13 sent out.
14 MR. ADELMAN: Excuse me, counsel. I
object,
15 your Honor. This is all material that -- this
witness
16 hasn't seen it and know whether the members
have seen it.
17 It has no materiality to the lawsuit.
18 THE COURT: Where are you going on
this?
19 What's the question I'll overrule?
20 MR. LONG: The question concerns
what
21 information has been out there for --
22 THE COURT: I'm saying, ask your
question.
23 MR. LONG: Okay, Mr. Murphy, if you
look at
24 this, and I apologize to everybody, this is
cupped over.
25 THE COURT: Just ask the question.

1120

1 MR. LERMAN: Okay, this statement,

it is
thousand
Have you
were a member
Air Force
Mr. Murphy.
it's the
service
is there
really read
period of time
is that
paragraph, less tar
the ads for
smoking
low tar and

2 estimated that smoking causes 25,000 to 300
3 premature deaths annually in the United States.
4 recalled receiving this information when you
5 of the fund?
6 A. In May of 1974 I was in the United States
7 overseas, so I have never seen this document.
8 Q. If you turn to Exhibit Number GZ 000214,
9 A. Okay.
10 Q. And if you look approximately, I think
11 second page. That's an October, November, 1983
12 employee?
13 A. That's correct.
14 Q. And there is an article attached to that,
15 not?
16 A. Correct.
17 Q. I think this is so small the jury can't
18 this. Let me read this to you. This is a
19 when you would be receiving these publications,
20 correct?
21 A. October, 1983, correct.
22 Q. Okay. It says here in this first
23 more tar -- excuse me, less tar, more taste say
24 the light cigarettes. But light does not make
25 right. In fact, a study reveals the smokers of

1121
attack.
cigarettes has been
increase of
Sciences. The
smoking
often. Or
besides
information before
is no
evidence that any beneficiary saw this or the

1 nicotine does not reduce their risk of heart
2 Moreover, the popularity of these light
3 accompanied by a substantial and unexpected
4 lung cancer, reports the National Academy of
5 reason may be that light smokers compensate by
6 more, inhaling more deeply, and/or puffing more
7 the danger may lie in the thousands of chemicals
8 tar and nicotine in cigarettes.
9 Do you recall reading the
10 when you received this publication?
11 MR. ADELMAN: Move to strike. There
12 evidence that any beneficiary saw this or the

witness saw

13 it.

14 THE COURT: Overruled.

15 BY MR. LONG:

16 Q. Do you remember seeing this when that was
published

17 in 1983?

18 A. If you are asking me if I can remember
reading

19 something from 16 years ago, no, I don't
remember reading

20 it.

21 Q. If you did read it you don't remember
reading it?

22 A. No, I don't.

23 THE COURT: Do you have any more
questions?

24 MR. LONG: Yes, your Honor, I do.

25 Q. I believe you testified on direct --

1122

1 A. Are we done with the book?

2 Q. Not quite.

3 A. Okay.

4 Q. I'm done with those particular type of
documents.

5 You testified in April of last year,
the fund

6 authorized assessment of a smoking cessation
program?

7 A. No, I didn't testify to that.

8 Q. Okay. When did the fund first authorize
someone to

9 look into the cost of a smoking cessation
program?

10 A. That's correct. In April we instructed
the fund

11 administrator to look into expanding benefits,
part of

12 which include smoking cessation.

13 Q. Okay. And that was a discussion and a
vote taken at

14 a meeting of the trustees?

15 A. Yes, it was.

16 Q. And that vote and meeting was followed a
report by

17 counsel on this litigation?

18 A. I'm sorry, repeat that question.

19 Q. Was there a discussion at that meeting
about this

20 litigation prior to the vote on the smoking
cessation

21 program?

22 MR. ADELMAN: Objection, privilege,
your Honor.

23 THE COURT: Sustained.

24 BY MR. LONG:

25 Q. Now Mr. Murphy, is it your personal belief
that most

1123

1 smokers, a majority of smokers cannot quit
smoking without

smoking 2 some type of medical assistance, some type of
3 cessation assistance?
think it's 4 A. Having been an avid smoker many times, I
5 multiple steps. Either you have to bottom out,
you have to 6 get to the point that other priorities in life
mean more to 7 you than craving for tobacco. And if you don't
get there I 8 guess there are certain persons that need
professional 9 assistance. What percentage that is, I don't
know. 10 Yes, there are probably some people
that are 11 going to need -- call it a crutch, if you will,
but may 12 need assistance to get off.
13 Q. You mentioned your actuaries made a
report, and we 14 saw the cost of a smoking cessation program, and
then 15 presented that to the trustees, correct?
16 A. That, and it was more than just that. The
expending 17 of the other benefits was also --
18 Q. But one of the focuses of what you asked
your 19 actuaries to do was to provide a report on the
cost of 20 smoking cessation?
21 A. That's correct.
22 Q. And that was done in July of last year,
July of 1998? 23 A. Summer, last summer, June, July.
24 Q. And that was over a year after this
lawsuit was 25 filed, is that correct?

1124
1 A. That's correct.
2 Q. How much did it cost to have the actuaries
prepare 3 this report on the cost benefits or costs of a
smoking 4 cessation program?
5 A. Sitting here I don't know.
6 Q. Did it cost anything?
7 A. I don't know many professionals that give
us services 8 for free. I couldn't answer that. I have no
idea what 9 they charged.
10 Q. Now, the actuaries gave the trustees a
letter 11 reporting on the cost of the various programs
they were 12 asked to look into, is that correct?
13 A. That is correct.
14 Q. If you look in the notebook, there is a
letter in

under IWL 15 there from Watson and Wyatt, and I think it is
letter 16 015048, it's about 15 pages back. It's a 3 page
17 from Watson and Wyatt the fund?
18 A. Dated October 29th.
19 Q. Yes, sir?
20 A. Okay.
21 Q. And this is the letter, sir, the one on
the screen.
22 I've now put it on the screen?
23 A. Yes.
24 Q. Okay, I want to look down here at the
bottom. Now at
25 that time the actuaries were reporting, if you
look at the

1125
indicates a 1 last highlighted sentence there, their review
for employee 2 surplus of approximately 36 dollars recovered
that 3 per month was being generated by the trust, is
4 correct?
5 A. That's correct.
6 Q. And then if you turn to the next page, one
of the 7 programs that you had asked the actuaries to
report on was 8 a dental program, is that correct?
9 A. That's correct.
10 Q. If you turn to the next page of that
exhibit, and if 11 you look at the highlighted section here, the
report of the 12 actuary basically said that in terms of this
dental care, 13 that the cost of that care would be
approximately \$23 a 14 month for a covered employee, is that correct?
15 A. That is correct.
16 Q. And that would leave about \$13 from the
surplus a 17 month, is that correct?
18 A. That is correct.
19 Q. If you turn to the very next page of that
document, 20 sir, this page refers to the cost of the smoking
cessation 21 program, is that correct?
22 A. Page 3, that's correct.
23 Q. And this smoking cessation program under
24 consideration involved both nicotine patches and
formal 25 counseling sessions, did it not?

1126
paragraph 1 A. That is correct.
2 Q. And if you look at the first, or the first
the patch 3 I have on the screen, and they are talking about

4 benefit. And the actuaries reported that the
aggregate
5 annual expense of the patches would be a cost of
6 approximately three dollars for the second
tiered covered
7 employees per month. Is that correct?
8 A. That is correct.
9 Q. And then the if you move up a little bit,
and
10 they are talking, and I apologize for the focus
on this,
11 they are talking about the cost of the smoking
cessation
12 program, it's the seminar type, correct?
13 A. The American Lung Association piece of
this, correct.
14 Q. And they say there the aggregate annual
expense
15 amount for that program would be about 80 cents
a month for
16 the tear 2 employees, is that correct?
17 A. That's correct.
18 Q. So the total cost of the program, patches,
and
19 counselling would be about \$3.80 a month per
covered
20 employee?
21 A. That is correct.
22 Q. And then in the next sentence, the next to
the last
23 paragraph, the actuaries point out the fund
could afford to
24 provide one or both of the programs, meaning the
smoking
25 cessation programs, in addition to the cost of
the dental

1127

1 benefit program, is that correct?
2 A. That is correct.
3 Q. And it goes on to say in the very last
paragraph,
4 that even as to the members covered by the tier
one benefit
5 program, that offering one or more elements of
the smoking
6 cessation program to them would likely represent
only a
7 nominal level of additional expense to the
overall fund, is
8 that correct?
9 A. That is correct.
10 Q. And you subsequently had a meeting of the
trustees to
11 discuss this recommendation, is that correct?
12 A. To discuss this, their analysis, correct.
13 Q. The information that they gave you?
14 A. That is correct.
15 Q. And was an actuary there at the meeting to
give an
16 oral presentation on the findings in this
letter?
17 A. I believe the actuaries were present,

correct.

18 Q. And at this meeting, even though the
actuaries had
19 informed the fund that it could afford both the
smoking
20 cessation and dental benefits, isn't it a fact
that the
21 trustees voted unanimously not to fund the
smoking
22 cessation benefits?
23 A. No. What the trustees voted on, again,
the overall
24 goal is to get the lower tier medical coverage
that covers
25 every participant of the fund. On the smoking
cessation,

1128

1 to whatever extent our participants smoke, the
motion that
2 was made and adopted was if we receive any
proceeds from
3 this litigation, to use that for smoking
cessation, the
4 education component, and to increase level of
benefits to
5 the participants.

6 Q. At the meeting, though, the trustees did
not vote to
7 start funding the \$3.80 a month for the
employees for
8 smoking cessation immediately, did they?

9 A. No, those reserves are being targeted, as
I testified
10 to.

11 Q. Okay. Mr. Murphy, is it a fact that you
first became
12 aware that the fund was a participant in this
lawsuit when
13 you were told by counsel?

14 MR. ADELMAN: Objection.

15 THE COURT: Sustained.

16 MR. LONG: That's all I have.

17 MR. ADELMAN: No further questions.

18 THE COURT: Thank you.

19 THE WITNESS: Thank you.

20 THE COURT: Thank you.

21 We'll take a break, about 10 or 15
minutes. At

22 a quarter 'til we'll resume. Same rules apply.
Don't
23 talk about the case with anyone nor among
yourselves.
24 We'll stand in recess.
25 (Brief recess.)

1129

1 THE COURT: Just put on the record
the
2 plaintiffs at this time intend to call Dr. John
Spears
3 who's with University of California, San Diego,
and as I

4 understand is a professor at that institution
and deals
5 with the cancer unit.
6 They have raised an objection. The
plaintiff
7 have indicated he will ask some questions of
the defendant
8 on direct examination dealing with children or
adolescent
9 females who smoke. And the defendant has
complained this
10 was outside the scope of his report.
11 MR. LERMAN: Your honor, can I, just
for focus,
12 the court precisely on the uptake issue or
adolescent
13 issue. Mr. Pierce is going to testify about
uptake of
14 women smoking in the late 50s and early 60's.
It's an
15 allegation that the advertising of female
brands caused
16 this up take of women smoking. That's nowhere
in his
17 report.
18 In fact, his report talks about
smoking
19 behavior and adolescent uptake starting in the
1980s;
20 doesn't go back to the 60's.
21 MR. CRANDALL: Your Honor, it is
true that it
22 is not specifically in the report, but it is
part of what
23 he did after he did the conclusions that are in
his
24 report. And it was -- we did tell them at the
deposition
25 that we are going to rely on other publications
that he

1130
1 had done. And I am not going to spend a lot of
time on
2 it.
3 THE COURT: We'll see how it goes,
but I'm
4 alerted at this point to your objection that
you may seek
5 testimony outside the scope, but I'm not going
to make a
6 ruling at this time.
7 MR. LERMAN: Just to give the court
the
8 motivation here, it's only that we are working
on such
9 limited time. I had no notice that he was
going to go
10 into this area.
11 MR. COUGHLIN: Your Honor, could I
ask you one
12 second, you asked me a question yesterday.
Could I have

13 this off the record. It deals with settlement?
14 THE COURT: No. Why don't we do it
over the
15 lunch hour.
16 JOHN PIERCE
17 called as a witness by and on behalf of the
Plaintiff,
18 being first duly sworn, was examined and
testified as
19 follows:
20 THE COURT: Please take a seat and
state your
21 name and spell your last name.
22 THE WITNESS: My name is John
Pierce. My last
23 name is P-I-E-R-C-E.
24 THE COURT: Counsel.
25 MR. CRANDALL: Thank you, your
Honor.

1131

1 DIRECT EXAMINATION
2 BY MR. CRANDALL:
3 Q. Dr. Pierce, would you tell the jury what
you do for a
4 living, sir.
5 A. I'm a professor in cancer research at the
University
6 of California, San Diego.
7 Q. Is that professorship you have something
which is
8 call an endowed chair?
9 A. Yes, it's the Sam Walton Chair for Cancer
Research at
10 the university.
11 Q. Do you hold another position aside from
being
12 professor at the university as well?
13 A. Yes, I'm responsible for the Cancer
Prevention and
14 Control Program in the cancer center. That
position is,
15 it's called an Associate Director.
16 Q. And would you tell the jury briefly what
the cancer
17 prevention and control center is?
18 A. Well, it's a National Cancer Institute
Center. The
19 National Cancer Institute designates or approves
certain
20 centers that reach a certain quality in terms of
their
21 research as NCI designated cancer centers.
22 And our cancer center for 17 years
and the
23 cancer prevention and control med center was
one that I
24 developed. And we have got an outstanding
review on the
25 last one, and we have a strong program.

1132

1 Q. And how long have you been at UCSD?

2 A. I went to UCSD in 1990.
3 Q. And you are from California. California,
San Diego?
4 A. Yes.
5 Q. And how long have you been there?
6 A. 1990.
7 Q. Would you briefly tell the jury what you
spend your
teaching
8 time doing? In other words, academics versus
9 versus research?
10 A. Most of my time is spent on research. And
I have two
11 research programs that I do. One relates to the
effect of
12 diet, specifically vegetables, on breast cancer
occurrence.
13 We have a very large randomized trial on that.
14 And we are actually trying to find
out whether
15 eating vegetables will prevent recurrence. And
the other
16 one, other half of my research time is on
tobacco
17 research.
18 And I'm specifically interested in
influences
19 on behavior. And I've had that research
program for
20 a long time.
21 Q. And what do they call the field of your
specialty?
22 A. I'm a behavioral epidemiologist.
23 Q. Please explain to the jury briefly what
that means?
24 A. Well, an epidemiologist is somebody who
studies
25 causation, causes of disease, and a behavioral

1133
1 epidemiologist is someone who looks at causes or
influences
2 on behaviors that are health damaging, or
potentially
3 health damaging, such as smoking, such as the
types of diet
4 that you eat, exercise can come into that,
behaviors that
5 are related to disease.
6 Q. And do you generally do that by studying
populations
7 of people?
8 A. Yes, you don't always do it that way. All
my tobacco
9 research has been population. I look at the
effect on
10 large numbers of people. But the diet and
breast cancer is
11 a randomized trial, looking only at 3,000 women
who have
12 been diagnosed with breast cancer and
volunteered for that
13 study.

the jury 14 Q. You used the word randomized trial. Tell
15 what that is?
16 A. A randomized trial is one of the higher
forms of 17 research where one of the issues, let me take a
minute and 18 what I could do is I could actually ask each of
you what 19 diets you are currently taking, and then follow
you for a 20 period of time and see whether people develop
disease or 21 not.
22 The problem with that sort of
research, it 23 could have been something else that caused you
to eat that 24 food at the beginning. And so the concept of a
randomized 25 trial is to take a, take people who are
essentially equal,

1134
going to go 1 and flip a coin and say, well, this person's
diet. And 2 into the group that eats the high vegetable
diet. 3 this group is going to stay on their current
diet. 4 And so there is no, no reason why
they would be 5 following a specific intervention.
6 So, you are pretty sure at the end
that any 7 results that you see are resulted to the fact
that you 8 flipped a coin and put them in that group.
9 Q. Okay?
10 A. This is not something you can do in
smoking because 11 it's unethical to randomize somebody to smoking
behavior. 12 Q. Now, is your field behavioral epidemiology
linked 13 with psychology?
14 A. Yes, it is. Psychologists study behavior
as well, 15 but from a different standpoint. They study it
from within 16 the individual, whereas an epidemiologist tends
to study 17 it.
18 We try and make conclusions that are
valid for 19 the population, and things that you can make
public policy 20 decisions upon. So, that's the focus of the
behavioral 21 epidemiologist.
22 Q. You mentioned earlier in your testimony
establishing 23 a cause and effect relationship. What are the

criteria? I
24 think there are five of them that
epidemiologists use to
25 determine whether or not something causes
something else?

1135

1 A. Well, let me go back a little bit. Even a
randomized
2 trial doesn't, no single study can give you
causation, give
3 you enough evidence to say that something causes
something
4 else. And over the years the field has
developed five
5 criteria that we have to address.
6 The first one is you look at all the
evidence
7 and say, is it clear that the influence of the
variable in
8 question comes before the symptom? In other
words, does
9 smoking happen before they got cancer? Or did
advertising
10 happen before they started smoking?
11 So, the temporal effect is number 1.
12 The second one, you look across the
studies and
13 say are they consistent? Are they all saying
the same
14 thing? Because one in 20 can go the wrong way
by chance.
15 So, you need to know there is a consistent
pattern of
16 effects.
17 The third one is the strengths of
the
18 association. You can have an association which
is
19 statistically significant, which is only a very
small
20 difference between the two just because you are
using huge
21 sample sizes.
22 If you are comparing all the people
in the
23 State of California with all the people in the
State of
24 New York, you can say one percentage point's
difference
25 was significant. But it needs to be higher
than that.

1136

1 And typically we are looking for
effects in
2 over 30 percent or 40 percent, sometimes it's
twofold. If
3 you are going to make a public policy decision,
you need
4 to know that changing the policy or coming to a
major
5 event like that is likely to have a reasonable

impact.

6 The next one is specificity. It
needs to be
7 specific to the event, not caused by something
else. So
8 its specificity is important. And in showing
the
9 relationship between a possible cause and an
event, you
10 really need to see the time line pretty close
in terms of
11 that.

12 Q. Would you use an example for the jury,
when you use
13 specificity what you are talking about?

14 A. Well, I've got some, there is a really
good example
15 in the tobacco advertising work in terms of, for
example,
16 you could say, if advertising leads kids to
start smoking,
17 then we ought to see it when they get all the
big new
18 advertising campaigns.

19 They have done a whole heap of them
at
20 different times. And how many of those
campaigns were
21 associated with huge swings up in the number of
teenagers
22 who started smoking. And that's specific. Did
it start
23 in the same year and did it finish.

24 I mean, it's a bit like a light
switch analogy.

25 You know. You come into a room, you flip the
switch. If

1137
flip it off,
2 the light goes on, it's pretty specific. You
random
3 it goes off. And you don't have your, not a
works the
4 control. The trial, flip up the switch and
light. That is a different type of design.

5 I mean, that's actually showing a
time series,
6 an interrupted time series design. It says in
other words
7 every time you flip the switch on, the lights
will come
8 on. Every time you flip it off, it will be
off.

9 If you see that, that's clearly very
specific
10 and you have some specificity.

11 Q. Now, is there another element like --

12 A. The fifth one, sorry I didn't get to it,
was
13 theoretical plausibility. In other words, from
everything
14 else we know, for everything else we know, does

this make
15 sense or is it right off the wall.
16 And in medicine we talk about
biological
17 plausibility. I mean, how we know the body
works. And
18 is it reasonable that this sort of thing can
happen and
19 again, so we can say that as well.
20 Q. Now, during your career have you published
21 publications in the field of cancer prevention?
22 A. Cancer prevention is a very broad field.
Most of my
23 work has been, well, it's not, I should say you
tend to
24 forget.
25 I've worked either in the area of
brain injury,

1138
1 people with coma, I've worked in the area of
heart
2 disease, and I've worked in the area of cancer
prevention,
3 and probably the last 14 years has been mainly
in cancer
4 prevention.
5 Q. And have you published numerous articles
in peer
6 review journals?
7 A. I've published probably 150, 160 articles,
all in
8 peer review journals.
9 Q. Is there some significance to the term
peer review
10 journal?
11 A. Yes, I can publish an article in the
newspaper, and
12 an opinion piece in a newspaper, and there is
very little
13 review of that. In a peer review journal,
typically, an
14 article will be submitted in, and as I'm an
editor on one
15 of these journals, associate editor, and it will
come in.
16 And so what I will do, I will look at the field
and say who
17 do I know who knows something about this area,
who is peer?
18 And I'll send that to them
anonymously so they
19 can't, they don't know whose paper it is, and
get them to
20 comment on it and say, is this good research?
Is it
21 carefully done? Do the conclusions follow from
the types
22 of research?
23 And so I'll get three sets of
comments back
24 from that. And if they all agree that this is
excellent

25 research, then the paper will go ahead to
publication.

1139

1 Most frequently they want more
clarification.
2 They want them to say something extra or they
want the
3 analysis done a little bit differently, and say
there will
4 be changes, et cetera.
5 But the peer review process is one
in which a
6 paper gets improved by other experts in the
field looking
7 at it and criticizing it, and commenting on it,
and giving
8 it either a thumbs up or thumbs down.
9 Q. And have your papers, within the smoking
field we are
10 going to talk about today, been peer reviewed?
11 A. Yes, all my papers have been peer
reviewed.
12 Q. And you mentioned you are on the journal
of several
13 publications. Would you tell the ladies and
gentlemen of
14 the jury what publications?
15 A. I am on the editorial boards or associate
editor,
16 which just means I get all the papers to send
out for
17 comment on three journals. One is Cancer
Epidemiology
18 Biomarkers, what are the biological makers of
featured
19 disease and prevention.
20 The second one is the journal
Nicotine and
21 Tobacco Research. And the third one is Tobacco
Control.
22 Q. Now, are you also a member of what's
called the
23 American Society of -- I'm sorry, the American
College of
24 Epidemiology?
25 A. Yes, I was elected a fellow of that
college in 1997

1140

1 and a fellow, you can join these colleges if you
have got a
2 basic degree in the field. And they have an
election each
3 year for people who have reached such prominence
in the
4 field they are considered experts. And I was
elected to
5 that in 1997.
6 Q. Now, have you also received with respect
to the
7 smoking research that we are going to go into,
awards in

8 the recent past, Dr. Pierce?
9 A. Yes, I have two awards this year,
actually. I've
10 received the Dull Winder Award. Sir Richard
Dull was the
11 first person who identified smoking can cause
cancer. And
12 Winder, he's an American equivalent.
13 And they have an award for
epidemiology. And I
14 won the first award on that. And that has to
do with my
15 research on tobacco control programs being run
by the
16 states -- do they work, and what's effective,
and what
17 isn't.
18 And recently I've just been told I
was,
19 received the Cullen award from the American
Society for
20 Preventive Oncology and the Cullen Award was
nominated for
21 my work on advertising and tobacco.
22 Q. Let me just do this quickly. There is,
I'm going to
23 place up on the board Exhibit Plaintiff's
Exhibit 4603. I
24 just want you to identify if that's your
curriculum vitae,
25 correct?

1141
1 A. That's a little blurred, but it looks like
it.
2 Q. Let me just zoom in on it, if I can just
briefly.
3 That's your curriculum vitae, right?
4 A. That's correct.
5 Q. Now, let me turn, Dr. Pierce, to how you
first came
6 to be involved in smoking research, smoking
epidemiological
7 research.
8 Tell the jury briefly how you got
involved in
9 this aspect of epidemiology?
10 A. Well, it was really serendipity. I was a,
I was a
11 professor in western Australia, just in case you
haven't
12 gotten the accent yet, where I was studying
heart disease
13 and specifically blood pressure and stress
relating to
14 blood pressure.
15 And I was invited to, you know, I
won a
16 fellowship, a national fellowship to go to
Stanford
17 University to undertake a doctorate. And I was
promised I
18 would be doing weight control.

19 But by the time I got to Stanford
that job had
20 been taken by someone else, and the job no one
else wanted
21 was to do something with teenage smoking in
high school.
22 And because it was an area of interest of mine,
in terms
23 of communications, in terms of how you
influence people
24 and what things are influencing them, I decided
to do that
25 as my thesis for my doctorate.

1142

1 Q. And you did get your masters and Ph.D.
from Stanford,
2 correct?
3 A. Yes, I have got a masters in psychology,
which I
4 worked with the world expert on behavior change,
Al Van
5 Dorn and my doctors in communication research.
6 Q. Now, after you got your Ph.D. from
Stanford, you went
7 back to Australia; is that correct?
8 A. Yes, I went back. These fellowships, you
know, they
9 don't like brain drains over there. These
fellowships have
10 a year to go back at least. So, I went back and
became a
11 professor in Sidney. And I was there for six
years.
12 Q. And just briefly, you worked on smoking
and tobacco
13 research, evaluating a tobacco control program
in
14 Australia?
15 A. It was about two years after I got there
they started
16 the first ever statewide program to try and
reduce tobacco
17 use in Sidney. And it was copied on the
community program
18 of heart disease from Stanford. And I became
the director
19 of the evaluation for that.
20 Q. Did there come a time when you then went
to work with
21 the Centers for Disease Control in the United
States?
22 A. Yes, when Surgeon General Koop was there
in '87, I
23 was invited to come to Washington and develop an
24 epidemiology program within the office of
smoking and
25 health which is responsible for the Surgeon
General

1143

1 reports.
2 He was very concerned that the study

of smoking
included in
thought that
happening.
the first
to create a
undertake the
research.
Q. And you went and did that; is that right?
A. Correct.
Q. Now, when you -- so, in other words, there
was a lot
national surveys
among other
and analyze
it; is that right?
A. Correct. I mean the first large survey,
government
showing
in 1955.
And then with the Surgeon General's
report when
the first official document of the United
States
Government said, you know, it actually causes
lung cancer,
there is no question. And it is public health
policy that
we should reduce smoking.
So, they started monitoring it in
the big

1144
basically almost
but almost
really had
what the
trends.
Q. And just briefly here when you say trends,
what are
you talking about briefly?
A. Well, let's say smoking, a number of
people smoking.
Is that going down? Is it going down in young
people? Are
more people quitting? Is there something

stopping people

12 from quitting that we can possibly find out?

13 When a program comes in such as the

first

14 advertising program on television which came in

in 1967,

15 that came in as part of the fairness doctrine.

And the

16 fairness doctrine is a very smart lawyer went

and said the

17 fairness doctrine says if there is a case being

presented

18 on the public media, and it's very

controversial and

19 possibly affects something else, then you have

the right

20 to have free time, one spot for every 12 spots

that are

21 being aired by the tobacco industry.

22 And so that came in. And the first

23 anti-smoking advertising started getting on

television

24 between '67 and '70. And so you were able to

look and see

25 what did that do? Did more people quit? Who

quit? What

1145

1 about the kids do it, do anything to the kids

who started

2 to smoke? So, look at the trends in

conjunction with the

3 events that occurred.

4 Q. And so is it true that you were heavily

involved in

5 writing, in analyzing data for three reports

while you were

6 at CDC?

7 A. Yes, the first report was the Addicted to

Nicotine

8 Report, which was quite crucial at the time.

9 Q. What was the second report?

10 A. The second report was the 25 years of

progress, which

11 is really what they had brought me in to do, to

identify

12 the trends so that they could put it in that

document.

13 Q. And what was the third one?

14 A. And the third one was, the health

consequences of

15 quitting.

16 In other words, did you really get

any benefit

17 if you did quit smoking; did it improve your

health?

18 Q. Now, and when was it that you were working

at the

19 CDC, approximately?

20 A. I was there from 1987 through the end of

1989.

21 Q. And in the course of your epidemiological

research

tobacco 22 there did you investigate the influences of
23 advertising at that time?
24 A. No, I didn't. We certainly looked at it
as part of 25 the 1999 Surgeon General's report. We looked at
all the

1146
1 evidence on advertising. And it became clear to
me that it 2 needed a different approach.
3 It needed some -- most of the
evidence had been 4 undertaken from studies by psychologists and
hadn't looked 5 at advertising at all. And there was a whole
field of 6 social psychology of how persuasive
communications work,
7 which I had been trained in, which wasn't
included in any 8 of the research.
9 The questions weren't there. And so
you 10 weren't really able to make an assessment of
what 11 advertising.

12 Q. Let me just stop you there. In other
words, there 13 hadn't been advertising questions asked in the
national 14 surveys that you were analyzing; is that right?
15 A. Well, not in the ones I was analyzing.
And I was 16 responsible for developing and coordinating the
first 17 national survey for ads for about 10 years. And
we got 18 everyone together and come up with the best
questions 19 available.

20 And we submitted, and the office
management and 21 budget cut out all the advertising questions
because they 22 said they were not health questions. And our
job was 23 health only, so, we weren't able to ask them.

24 Q. Now, nevertheless, what did you learn from
your 25 epidemiological analyses at the CDC regarding
smoking

1147
1 prevalence; would you tell the jury?
2 A. Well, yes. First of all, smoking
prevalence 3 declined. Probably, well, certainly from 1964
onwards it 4 declined across the country. Recently it's
leveled off. 5 What we saw was the -- one of the

really big
information through
non-smoking adults,
starting to
of the war
24 year
down to one
stopped.
us was
were very
adults trying
quit. But
And it takes
would make
and '60's was
actually
was a huge
able to do

6 effects of the dissemination of health
7 the Surgeon General's report was that
8 young adults who are non-smokers stopped
9 smoke. And so what happened, at about the end
10 between age 18 and 24, that 25 percent of 18 to
11 olds who had never smoked started to smoke.
12 By the mid-1980s that was virtually
13 percent or something like that. It basically
14 And so it looked clear to us, the conclusion to
15 that the messages of the public health group
16 effective with adults.
17 We also saw up to 30 percent of
18 to quit at that time; and I mean trying to
19 quitting is very difficult for most people.
20 persistence and a lot of time. And 30 percent
21 an attempt.
22 But the success rate in the '50's
23 about two percent per year for all smokers were
24 successfully able to quit. So, clearly there
25 problem of people wanting to quit and not being

1148
the new
was there,
second because
define that
about?
given year
the term at
So, you
and how

1 it, trying and not being able to do it.
2 But the big success was cutting off
3 smokers among young adults. But the problem
4 was very little effect before 1970 in terms of
5 adolescents. So, the message wasn't there.
6 Q. Okay. Now, let me just back up for a
7 you used the word smoking prevalence. And just
8 term so everybody knows what you are talking
9 A. That's just the number of smokers in any
10 in the population. The number of people we use
11 risk. The number of people at risk to smoking.
12 can say everybody in the room could be a smoker,
13 many people smoke. And that's the prevalence.
14 Q. Go ahead and that had been decreasing from

the

15 1960's?

16 A. Yes. Clearly from the 1960's.

17 Q. In adults?

18 A. In adults.

19 The changes in that are made up of,
you know,

20 someone can die, smokers were dying at higher
rates than

21 non-smokers. People could successfully quit or
quit for a

22 small period of time and go back. So, they

would be off

23 at the time they were surveyed. They wouldn't,
wouldn't

24 be smoking. And the other big driving force on
that would

25 be the number of people coming in the number of
new

1149

1 smokers.

2 And one thing was very interesting
on that. We

3 looked at physicians. Physicians are very
interesting

4 group. It turns out that, you know, in 1964
half the

5 physicians smoked. And half the medical
students smoked.

6 So, all the new ones coming in -- it was about
50 percent

7 smoked.

8 And we looked at the physicians over
a period

9 of time and those who smoked, and they weren't
much better

10 at quitting than other highly educated groups;
they were

11 about the same.

12 But the prevalence of smoking in
physicians

13 took a nose dive. And by the mid-1980s that
was only five

14 percent. And that was -- the reason that
happened was

15 because medical students stopped smoking
shortly after the

16 Surgeon General's report came out.

17 I think by about 1970, '75, medical
student

18 smoking had gone down from 50 percent to one
percent. So,

19 none of the new doctors coming in were smoking.

And that
20 just dropped the prevalence of smoking

dramatically in
21 that group.

22 So, it became clear that the big
issue on

23 smoking prevalence and the big issue on
preventing future

24 smoking attributable deaths had to do with

preventing

25 people starting to smoke. And, as I said, that
was really

1150

1 now in only the adolescent group.

2 Q. Okay. Let me switch gears from prevalence
to

3 something that's called initiation rates. Tell
the jury,

4 if you will, what smoking initiation rates are,
or smoking

5 incidence?

6 A. Well, this was one of the things that, you
know, we
7 needed to do for our assessment of the impact of
events.

8 Such as a new tobacco control program in
California, or

9 there is one in Michigan, or Massachusetts, or
other

10 places.

11 How could you identify the effect on
people

12 starting to smoke. And so we needed to, would
come up

13 with what we said was incidence of initiation.

14 Q. And that's a term -- I don't mean to
interrupt you --

15 because that's a term you are going to use as we
get in

16 further into your testimony. So, would you
carefully

17 explain what that means to the jury?

18 A. An incidence rate is one of the standard
measuring

19 tools of epidemiologists. An incidence rate, an
incident

20 rate is the number of non-smokers in any given
year, the

21 start of a year, who start smoking during the
year.

22 So, in other words, if I'm looking
at 15 years

23 old, if they have already started smoking, I
don't count

24 them. So, I only take the non-smokers at the
start of the

25 year and say how many of those started smoking
during that

1151

1 year. And that rate's going to change over
time.

2 And if you follow that rate and you
measure it

3 and you can see how specific it is to different
4 interventions, whether there was a new

advertising program

5 by the industry, whether it had an impact on
it, whether

6 the fairness doctrine or this anti smoking
program

7 started, and whether that had an impact on it.
And is
8 there trends that are stable and appear to be
related to
9 specific events.
10 Q. So, any incidence of initiation is looking
at the
11 percentages of certain cut of the population
that would
12 start smoking at a particular point in time?
13 A. Yes. I mean, particularly. So we take
one age group
14 and say of the non-smokers at the start of that
year how
15 many started smoking during that year. And
normally to do
16 that, you would need big surveys every year.
17 You need to be up there asking
people each
18 year. But what we were able to do, we were
able to
19 reconstruct it because it turned out when we
asked people
20 when you started smoking. They are pretty
accurate. We
21 had surveys over different years.
22 And we were able to show that the
people born
23 between say 1940 and 1945, doesn't matter
whether they
24 were surveyed in 1965, in 1975 or 1985, the
same
25 proportion said I started smoking when I was
14. The same

1152
16.
1 proportion said I started smoking when I was
2 And so we were able to say, this
looks like
3 it's valid information, it doesn't change as
they get
4 older.
5 And so we said, okay, if they
started when they
6 were 14, now, a non-smoker at a particular
year, and they
7 started during that year. So to create it
retrospectively
8 we put a huge sample together, 200 thousand
people,
9 something like that, and work out how many were
10 particularly interested 14 to 17 year olds.
And also 18
11 to 21, specific age groups, how many of those
people
12 actually started smoking in any specific year.
13 And we are able to do it because of
the large
14 sample size. We are able to do it for boys and
for girls
15 and different subgroups.
16 Q. So, that was quite something because those

national
didn't
were able
what those
altogether
our big
health,
is the
starting. For

17 surveys that had gone on before you got there
18 specifically find out initiation rates, but you
19 to take them all and work backwards and find out
20 rates were?
21 A. Yes. It took us a couple years to get it
22 and work out how to do it. But that was one of
23 goals when I got to the office of smoking and
24 because any epidemiology program they say what
25 incidence rate, what the rates of people

1153
versus
to 70 age
diagnosed
know they have
rate is how
prevalence rate is

1 example, let me give you an example of incidence
2 prevalence.
3 Heart disease, many people in the 55
4 group have got heart disease. They have been
5 with it. They know they have angina. They
6 to take medication for it. But the incidence
7 many were diagnosed this year. And the
8 how many out there have got it.

from
trends on
adolescent
that to the

9 Q. I want to focus on the trends you found
10 analyzing the CDC data in terms of what were the
11 both the adult non-smokers and then on the
12 smokers between say 1950 and 1980. Please tell
13 jury.

I've covered
25 percent
among the
down to one

14 A. Well, with the adult non-smokers I think
15 already. What I was saying was there was about
16 at the end of the 1940's and 1950 and a drop
17 adults who, let's say, 21 to 24, and dropped
18 percent in 1995.

decrease in the
smoke.

19 So, there was just this huge
20 number of young adults who were starting to

increase --

21 Q. And what, if anything, did that huge

of the

22 A. Decrease.
23 Q. -- decrease in adult smoking mean in terms
24 number of people who would smoke in the future?
25 That obviously wasn't the right way

to ask it,

1154

1 so let me try it again. What did the lowering
of the 2 rates mean for smoking prevalence in the United
States?

3 A. Well, that depends. And it depends on
whether the 4 adolescent rates are going up or going down or
staying the 5 same.

6 I mean, just because young adults
are not 7 starting to smoke, is there any difference in
the number 8 of people starting to smoke. If you -- the CDC
recently 9 put some data out, and we'll get to it in a
little bit, 10 showing a huge number of increase in
adolescents starting

11 to smoke, showing rates of higher than before
the first 12 Surgeon General's report.

13 And so what can happen is you can
have a big 14 success in your young adults. I mean,
basically the 15 message, the public health movement has got is
that 16 smoking kills. And young adults, many with
young families 17 are very sensitive to that. But adolescents
are a little 18 bit immortal. It doesn't work very well with
them.

19 So, the fact that it came down to
young adults, 20 if the rates went up in adolescents and
counteracted it, 21 it would have no impact.

22 Q. So, basically since the adult rates were
going way 23 down, to maintain a large number of smokers
would require a 24 large number of adolescents to begin smoking?

25 A. If you -- if the interest was to maintain
the tobacco

1155

1 consumption level in the community or prevalence
in the 2 community, the average number of cigarettes has
always been 3 about a pack. And so it doesn't go much higher
than that, 4 certainly since 1970.

5 The only way to increase your
consumption would 6 be to increase the number of consumers. And if
you can no 7 longer convince adults to start smoking, then

probably you

8 would be looking at adolescents.

9 Q. Let me switch topics now for a second.

Did your

10 research that you have been doing look at

addiction as well

11 as incidence of initiation and looking at

measuring

12 addiction?

13 A. Yes, the -- as I said before -- you know,

the issue

14 of nicotine addiction was the Surgeon General's

report of

15 1988. I've tried to convince Surgeon General

Koop that he

16 should call it the pharmacological basis for

nicotine

17 dependence. And he looked at me and said you

are crazy.

18 It's nicotine addiction we are talking about.

You can't

19 use all these jargon terms is what he said.

20 So, if you look at the literature,

you'll see

21 it in terms of dependence. But the Cullen

phraseology is

22 addiction.

23 Q. And did you use standard measure to

determine --

24 withdraw that. In the research that you did

that we are

25 now going to talk about, did you do a measure of

addiction

1156

1 that you defined some way?

2 A. Well, there is -- the medical community

has standards

3 for how they diagnose things, whether it be

heart disease,

4 whether it be cancer. And they meet regularly

and

5 formulate, this is how we are going to do it.

6 And they -- the one for addiction is

in what's

7 called the DSM 4. And they actually outline --

8 thank you -- outline total of seven criteria

relating to

9 substance dependence. And there are five that

clearly

10 relate to nicotine addiction. And if we could

just have a

11 bit of a look at those.

12 MR. BERNICK: This relates to what

we raised

13 earlier regarding the scope of the testimony.

I object to

14 this line of questioning.

15 THE COURT: I'll deny your

objection.

16 A. So, the first criteria is physiological

tolerance.

17 And tolerance means once you start using a

product, you
18 slowly get -- start using it more and more
frequently.
19 For example, nobody expects a young
adolescent
20 who's starting to smoke to smoke 20 cigarettes
on the
21 first time. That would, they would be very
sick and never
22 start again.
23 But that's -- they start with one or
two and
24 get up to four or five. So, tolerance is, it
builds a
25 capacity for the body to handle the substance.
So, that's

1157

1 the first one.
2 Q. What's the second criteria?
3 A. The second one is there is a persistent
desire to
4 quit, and continued unsuccessful effort to quit
smoking.
5 So, people want to do it, and they keep trying,
but
6 they are not successful.
7 Q. And what about the third?
8 A. The third is if the individual stops
smoking, and
9 with no nicotine substitute were put in,
withdrawal effects
10 are experienced. There is what they call a
withdrawal
11 syndrome, a sort of pattern of things that
people
12 experience and have difficulty with because they
have quit
13 smoking.
14 Q. Okay. What was the fourth?
15 A. The fourth is the typical pattern of
cigarette use is
16 heavier, and of a more, much more prolonged
duration than
17 the individual ever intended. So, a person
might say I'll
18 smoke just for a couple of years and then they
find out
19 though they smoke for 20 or something like that.
20 Q. What is the fifth one?
21 A. Individuals continue smoking despite the
knowledge
22 that continued cigarette use is harmful to their
health.
23 So, the fact they know it is harmful
to their
24 health is not enough to enable them to stop
smoking. And
25 that was particularly the case in the
physicians. Even

1158

1 though they really knew the harm of it, they

were unable

2 to quit.

determine

3 Q. In your work with adolescents did you

the DSM

4 whether or not the adolescents met the criteria

5 criteria you just talked about?

6 A. Yes, we actually did that.

7 MR. LERMAN: Excuse me, your Honor.

Again this

8 is beyond the scope of expertise at this point.

did.

9 MR. CRANDALL: It's research that he

the report

10 MR. LERMAN: Let alone for beyond

11 submitted in this case.

12 THE COURT: I'll deny the objection.

remember that

13 A. If we look at criteria one, and you

going to

14 criteria one was tolerance. If we look at, I'm

marker for

15 use now, we looked around and said what's a

addiction seems to

16 addiction. And a reasonable marker for

17 be a hundred cigarettes.

subsequent

18 Q. I don't mean to interrupt you, but in the

jury you were

19 studies that you are about to explain to the

addicted so

20 looking to define what it means to have someone

that right?

21 you could use that marker in your studies; is

if we start

22 A. Well, clearly the issue is, the issue is

everyone said well

23 looking at when someone starts to smoke,

before they

24 the first thing is there is some sort of period

25 even experiment, and then there is an
experimentation, and

1159

more and

1 after that they slowly start smoking more and

2 eventually become a daily smoker.

on to that

3 So, the question: When do they get

they are

4 where they can't get off? When can you say

different

5 actually addicted? And so we are looking at

way. So,

6 variables and can you say adolescents are that

year olds

7 what I am doing here is I'm looking at 15 to 17

8 who smoked a hundred cigarettes.

reasonable

9 And I'm saying that looks like a

1955. And

10 mark. It's been asked in all the surveys since

11 so how many of these adolescents meet these

criteria.

12 Q. The DSM criteria?

13 A. DSM criteria.

14 Q. Do you look at the adolescents, see how many meet the

15 criteria and see if you can use a hundred cigarettes as a

16 benchmark for your inquiry?

17 A. Yes.

18 Q. Tell the jury what you did, looking at PDEM 10426,

19 how well the adolescents matched up with the DSM criteria?

20 A. What we are saying here, over time, on the tolerance

21 the average consumption level increased by 50 percent from

22 ten cigarettes a day to an average of 15 cigarettes a day

23 within a three year period.

24 So, there was clearly a major increase in

25 smoking going on in these adolescents who met the

1160

1 criteria.

2 Q. What was the next thing?

3 A. The criteria, it was approximately 80 percent of

4 these kids who report that they smoked a hundred cigarettes

5 reported trying to quit in the past six months, with the

6 vast majority being unsuccessful.

7 So, they were clearly trying to quit but

8 couldn't do it. And that was 80 percent.

9 Criteria three was 80 percent indicated that

10 they suffered the standard smoking withdrawal symptoms.

11 And when we went into that, we didn't actually think these

12 kids, who were a lot of smokers, would have the same

13 withdrawal pattern. But they were all reporting the same

14 problems. And so that's 80 percent of all these kids that

15 smoke a hundred cigarettes.

16 Q. What about criterion four?

17 A. Okay, criterion 4 is that they will smoke much longer

18 than they intended. And kids tend to smoke less than five

19 years, generally. And what we found is that a half of them

20 were still smoking 16 to 20 years afterwards.

21 If they had smoked a hundred cigarettes by 14,

22 they were still smoking at 35, no matter if they had made

23 repeated attempts to stop.
24 Q. What about the fifth criterion?
25 A. The fifth criterion indicates that
numerous surveys

1161

1 indicate that adolescent smokers are very
knowledgeable of
2 the health consequences of smoking.
3 In other words, they know the
consequences
4 better than the adults.
5 This is associated with intentions
to quit. It
6 doesn't predict who will be successful. That's
the same
7 with the adults. It was the same with the
physicians.
8 The fact that you know the problems doesn't
mean that you
9 can change your behavior.
10 Q. And so now you use these criteria and you
came up
11 with the hundred cigarette benchmark to describe
what
12 addiction would be; is that correct?
13 A. Yeah, clearly the reason we are doing this
is not
14 everyone who is experimenting goes on to become
addicted.
15 But most of those who get to a hundred
cigarettes, you
16 know, clearly 80 percent of them are still
smoking three
17 years later.
18 They have actually become addicted.
This looks
19 like a pretty good marker of when the addiction
has
20 actually set in.
21 Q. Using the criteria of a hundred
cigarettes, what did
22 your research show in terms of the age people
become
23 addicted in the United States?
24 A. Well, this has changed over time, as I was
saying,
25 because the number of adults, non-smokers was
declining.

1162

1 Is there -- I think is there a slide
I had of
2 that.
3 Yeah, that's it. And what we can
see here is
4 that it's not until about 14 that about five
percent of
5 them have actually hit a hundred cigarettes.
6 And you can see by about 18 it's one
quarter of
7 the adolescents have actually gotten to a
hundred

8 cigarettes. It doesn't go much higher than
that, a little
9 higher, but not much higher than that. So, all
of this
10 addiction is occurring between 14 and 18, or
let's say 90
11 percent of them.
12 Q. Now, this is, now you have looked at and
talked about
13 research you did at the CDC and analyses of that
data. How
14 long did you stay at the CDC?
15 A. Well, I stayed there from '87 mid-'87
through the end
16 of 1989. So two years.
17 Q. And were you asked to stay longer?
18 A. Yes, I was.
19 Q. Why did you leave?
20 A. Well, my son was diagnosed with diabetes.
My wife
21 was very concerned that we got a warmer climate
so he could
22 exercise and maintain control of his blood
sugars.
23 Q. Is that how you wound up in southern
California?
24 A. Why we went to San Diego, yes.
25 Q. Is that also around the time you first
began writing

1163

1 on the subject of advertising influences?
2 A. Yes, I read an editorial in a journal,
this actually
3 had followed up from our Surgeon General
analysis where we
4 looked at the data. And we had seen patterns
that were
5 very important in exposure for cigarettes and
advertising
6 and the liking for them, and the fact this
advertising was
7 very good for kids, attracting kids to like
them.
8 And I was asked to review this
longitudinal
9 study which longitudinal study followed kids
over time.
10 And it turned out in that study the only
predictor of
11 which 12 year olds started smoking 2 years
later was
12 whether or not they liked television
advertising.
13 And this actually had replicated
exactly
14 another study done in Australia. The questions
weren't
15 specific to tobacco advertising, but anyone who
liked the
16 advertising on television.
17 Tobacco advertising at that time, at
the time I

18 had done the study, was about 30 or 40 percent
of all

19 advertising on television.

20 Q. Did this report convince you that
advertising played

21 some kind of important role in encouraging
adolescents to

22 smoke?

23 A. When taken in conjunction with all the
others we

24 looked at, the Surgeon General report, and this
was a

25 different study from the same part of the
country, that was

1164

1 pretty convincing I thought. It was time to
take some

2 prudent health action at that stage.

3 Prudent health action, if you are a
public

4 policy person, or epidemiology prudent health
action is to

5 keep a drug off the market, unless it's really
safe. And

6 if something is already on the market, let's
remove it for

7 a period until we know it's safe. And so I, in
the

8 editorial I suggested they continue their
tobacco control

9 programs, and they banned, they extend the ban
on tobacco

10 advertising.

11 Q. Now, UCSD, at that point did you begin to
undertake

12 evaluations of the State of California tobacco
control

13 program and conduct your own research surveys?

14 A. Yes. One of the things, the State of
California had

15 passed a voter initiative where they put an
extra 25 cent

16 tax on tobacco and designated 20 cents of it, I
think it

17 was, to go to a statewide education program to
reduce

18 prevalence of smoking. And that passed in 1988.

And were
19 just getting around when I was going to
California to put

20 out a request for researchers to evaluate that.

And so we
21 put an application in, and we were successful
and undertook

22 the contract.

23 Q. And that contract involved, among other
things, a

24 large household survey that went on for a period
of many

25 years; is that right?

1165

1 A. Yes. The design for anyone who knows
anything about
2 surveys, these Gallup surveys have something
like 15
3 hundred people. This survey was 30 thousand
people. And
4 the reason it was so big was because the
government wanted
5 to be sure that we could actually tell within
very tight
6 confidence limits what was going on, whether the
program
7 was impacting minorities, whether it was
impacting young
8 people.

9 And then they want also to know
whether it was
10 only impacting San Francisco as opposed to Los
Angeles,
11 the politics are big like that.

12 Q. So, you got a large sample size which
would allow you
13 to do minute measurements of impacts in those
categories?

14 A. Yes, it was every three years to do these
huge
15 surveys. And in other years it was a smaller
one, about
16 10,000.

17 Q. Did you use the surveys and results of
those surveys
18 to begin publishing research data on the effect
of tobacco,
19 sir?

20 A. Well, this clearly was the chance that I
had been
21 looking for to see whether questions that, on
persuasive
22 communications, how persuasive communications
were, we can
23 put those questions into a survey and to see
whether they
24 had any impact in terms of adolescent smoking in
25 particular.

1166
had been no
1 Q. Because up until that time there really
2 advertising questions asked. So, you were able
to

3 incorporate them in your California survey.
4 A. It was strange, because there had been,
since the war
5 there was about 20 years of research in social
psychology
6 which actually dominated the field for 1950,
1960 on
7 influences, on how we influence people to do
things. And
8 none of the papers we were looking at in terms
of how
9 people started smoking included any measures on
it or

10 included any discussion of it; they all came
from a
11 different field of psychology.
12 And so the issue was to start afresh
and try to
13 do it, start as early as we could.
14 Q. And your first paper on the subject of
tobacco
15 advertising was published approximately when,
Dr. Pierce?
16 A. That was in December 1991, it was in the
Journal of
17 the American Medical Association.
18 Q. I'm placing up on the board now
Plaintiff's Exhibit
19 4605, which just is the first page, and really
the top of
20 the first page of that article. This is -- and
it wasn't
21 just you on it, it was a team of researchers
that you were
22 in charge of, is that right?
23 A. Yes, well one of the things that we did
with these
24 large surveys, the first thing you do, you go
out and get
25 yourself the best statistics you could find.
And so we had

1167

1 a team of really good researchers, and I've
managed to keep
2 them together over the years.
3 Q. Now, if we could have PDEM 0128.
4 Okay. Now, Dr. Pierce, this was
your first
5 research effort involved in trying to isolate
the effect
6 of advertising based on research surveys that
you did in
7 California, is that correct?
8 A. Correct.
9 Q. Could you explain to the jury what the
major findings
10 from your 1991 research paper were?
11 A. Well, this is, this is a single survey, so
it's cross
12 sexual, just a photograph at a point in time.
And so you
13 can't make temporal statements relating to it,
but what we
14 said was, that there would be credible evidence
that the
15 tobacco advertising was a major influence on
encouraging
16 young kids if we found three things.
17 Q. Dr. Pierce, I hate to interrupt you, I was
just
18 interrupted by my colleague that is a typo. It
says 1981
19 study; that should be 1991 study?
20 A. It was 1991, yes. Heavily advertised
brands were

21 noticed more by adolescents than older adults.
22 We asked a couple questions: What
brand of
23 cigarettes do you think is the most advertised?
And do
24 you know any other brands that were advertised?
25 So we were interested not in the
what the

1168
1 reality was, but what the perception was.
2 And it turned out that all the kids
saw Joe
3 Camel and nobody over 35 did. It actually was
very
4 specific, and it was highest in about the 12
year olds it
5 was very low.
6 So the heavily advertised brands
were known
7 more by minors than adults. That was really
Camel and
8 Marlboro. The market share of brand in minors,
kids that
9 were smoking, reflected the pattern of
recognition. They
10 were only starting with two brands, Camel or
Marlboro.
11 And the Joe Camel campaign recently started,
had built a
12 market share disproportionately in the young.
The Camel
13 market share claimed disproportionately in the
young.
14 So we were able to demonstrate that
by
15 comparing California data with some national
data. So
16 this was one of three papers which had a very
strong
17 public impact at the time.

18 Q. Now, after this paper was published in
1991, did
19 you -- well, let me withdraw that and ask you
this.

20 This paper was based on your own
research data,

21 is that correct?
22 A. Correct.
23 Q. Was that the only data that you used in
terms of
24 researching the question of the advertising
impact?
25 A. Well, no. We decided then to go into two
paths, two

1169
1 separate paths to look at this question.
2 And the first one comes back to,
remember, we
3 need to show specificity and the light switch
analogy I
4 was making. So we said, well, you know, if Joe

Camel is
us a
occurred
through the
The one
very concerned
made a big
their
tell in
old they
well, let's
Slims was, was
and the
until then
brands that
that was
special
look there
associated

5 having this effect here now, it's going to take
6 number of years to demonstrate it. It probably
7 or it may have occurred in early campaigns.
8 And the one there was we looked
9 literature, the one there was a lot of concern.
10 the public health advocates had really been
11 about at the time was Virginia Slims and they
12 statement about Virginia Slims.
13 And so we were ready to come up with
14 measure of incidence of initiation so we could
15 what year people were starting to smoke and how
16 were. So we went back and we looked and said,
17 look at this time period, because Virginia
18 the most popular brand of the women cigarettes,
19 women cigarettes were introduced in 1967. Up
20 the tobacco industries had advertised their
21 had a woman's campaign, but it was for a brand
22 also smoked by men at the time. So they made a
23 cigarette for women and targeted woman.
24 So we said, all right, let's have a
25 and see what happened. And first of all was it

1170
smoking.
girls or for
under age
age group
study and found
Camel and
then went
database

1 with an increase with the people who started
2 And second, was that specific for
3 young ladies?
4 And then the third thing was, was it
5 or was it 18 to 21 or 22 to 25. I mean, what
6 was it?
7 Q. In other words, having done your 1991
8 out results through your own research about Joe
9 what it was doing in the adolescent market, you
10 back and looked at other campaigns based on this
11 that you had from the CDC?
12 A. Correct. I mean that's what we did.
13 THE COURT: Before we get to that,

we are going
14 to take the lunch recess.
15 12:40. There are some things over
the lunch
16 hour, so it may be a few minutes after that.
But take
17 about 40 minutes, and at 12:40 be back in the
jury room.
18 Same rules apply. Don't talk about
the case
19 among yourselves or with anyone else. But
we'll take a
20 few minutes.
21 (Luncheon recess.)
22
23
24
25

1171
1 Thursday afternoon session, February 25,
1999.
2 THE COURT: If you will take a seat
and,
3 doctor, you remain under oath. And if you will
continue
4 your direct examination.
5 BY MR. CRANDALL:
6 Q. Dr. Pierce, at the break we were talking
about after
7 you had done your 1981 paper when you had
focused on other
8 research and done additional research on tobacco
9 advertising.
10 You remember where we were?
11 A. Yes.
12 Q. And when you went back and did that
additional
13 research, tell the jury, if you would, what you
found out?
14 A. Okay, we did two parts to the research, as
I think I
15 was outlining. One related to, with a previous
campaign,
16 were associated with an increase in the uptake
of smoking.
17 Q. Right.
18 A. By adolescents and young adults. And the
other one
19 was to start looking at the mechanisms for how
something
20 would work. We went two different ways.
21 Q. I want you to go down the first path,
looking at
22 other tobacco campaigns?
23 A. Okay. The campaign that, that generally
has a lot of
24 interest, certainly a lot of concern among the
public
25 health advocates was the Virginia Slims
campaign. I think

1172

1 I covered some of that. The Virginia Slims
there was this
2 new brand of cigarettes in 1976 and Virginia
Slims was very
3 popular.
4 Q. You did a research paper on that as well?
5 A. Yes; that was published in the Journal of
the
6 American Medical Association in 1994.
7 Q. I put up on the board Plaintiff's Exhibit
46067. Is
8 that the front page of that article appearing in
the
9 Journal of the American Medical Association?
10 A. Yes it is.
11 Q. And if we could have PDEM 116, please.
And, Dr.
12 Pierce, what was the conclusions of your
research based on
13 that advertising campaign as it pertained to
young women
14 and women in general?
15 A. Well, what we saw was during that period
the only
16 group who increased their initiation of smoking
who started
17 smoking were the young girls 10 to 17. There
was a decline
18 in smoking over that period for women 18 to 21.
19 And for men, there was no
significant effect
20 either way. But particularly you can see this
is, this is
21 just a sales -- when all these women cigarettes
really
22 took off.
23 And the sales you can see increased
24 dramatically. But the group that had the
threefold
25 increase who started to smoke was 10 to 17 year
old girls

1173
1 who didn't go on to go college. And those who
went to
2 college had an effect, but it was much smaller.
3 So, there was there is only 2 groups
in all the
4 population we looked at who had marked swing,
increase in
5 associations and these test. That was those 2.
6 Q. Those were under age women?
7 A. Under age women, yes.
8 Q. And did you go further and look at
historical data
9 across a broader band of time to see whether or
not you got
10 the same trends that you had with Joe Camel and
Virginia
11 Slims?
12 A. Yes, the question of specificity was the
one. And
13 when we published the start of, the people from

the Tobacco

14 Institute said it's just coincidence.

15 Q. Which is coincidence?

16 A. Such an effect is just coincidental; that

the

17 advertising and marketing of the women's

cigarettes with

18 this huge increase in starting to smoke among

under age

19 girls was just coincidental. It could have been

from a lot

20 of other things.

21 Q. And so what did do you in response to

that?

22 A. Well, if it was just coincidence, the

issue is it

23 shouldn't have occurred when other major

campaigns were

24 conducted. We said let's go back and look at

the other and

25 see whether under age smoking increased during

the other

1174

1 campaigns.

2 Q. Did you do that?

3 A. Yes, we did.

4 Q. Did you publish a paper on it?

5 A. Yes, we did.

6 Q. I'm going to place on the board what is

again the

7 first page of Plaintiff's Exhibit 4607. I'm

going to just

8 zoom in on the title.

9 Is that the paper that you --

withdrawn.

10 Was that published as well?

11 A. That's published in health psychology.

That was the

12 historical analysis of marketing uptake and

smoking.

13 Q. Where you looked at a broader band of

groups at the

14 time?

15 A. Yes, we looked at what we thought were

innovative

16 campaigns to see if they were associated with

the uptake of

17 smoking.

18 Q. If we can go to 112, please. And what,

Dr. Pierce,

19 were the results of that broader look over time

and other

20 advertising campaigns?

21 A. Well, first of all, with this one here,

this is, this

22 is the per capita consumption data for the

United States.

23 And I think you have probably seen this before.

24 The 1950 was the time that the

public health

25 concerns first increased. And prior to that,

there was

1175

1 unopposed cigarette advertising. And after
that there was 2 both public health campaign going on, as well
as tobacco 3 advertising.
4 And so we said, let's focus in on
these big 5 swings. As you look at the first one, there is
a big 6 swing going up here, into consumption, between
1999 and 7 1919, there is two other big swings. One
occurred 8 basically between basically '25 and 1930. And
the other 9 one was 1933 through 1940.
10 I'm not counting this period here
because that 11 was basically free cigarettes during the second
world war. 12 But we could have looked at that as well.
13 Q. And what did you find when you looked at
each of 14 these periods in terms of the influence of
advertising just 15 correlated with the uptake of smoking?
16 A. Well, what we saw first of all was
basically before 17 1950 there was very little quitting going on.
Less than 18 one percent of smokers were quitting at any
point in time. 19 And so now the increase here in
terms of per 20 capita consumption, it could have come about
from 2 21 things. It could have come about because there
was a 22 major increase in the amount of cigarettes
smoked by 23 people who already smoked.
24 So, instead of smoking a pack a day,
they went 25 to two packs a day. Or it could have come
about by more

1176

1 people coming into the market. And each one of
these 2 cases it was a major increase in the number of
people 3 coming into the market.
4 And when we looked at that, this is
back before 5 public health concerns, when we looked at that,
we found 6 that in each case there was a huge increase
between the 7 ages of 14 and 30.
8 So, the uptake of smoking wasn't
limited to

9 adolescents, but it certainly occurred in
adolescents.
10 There was a big increase in adolescents, but
there were
11 also big increases in young adults.
12 Q. And did this in any way validate or add
more credence
13 to your beliefs and impact of advertising?
14 A. Well, in particular this first campaign
here was the
15 first Camel campaign. And we know there was a
lot of
16 advertising then because R.J. Reynolds, who's
the founder
17 of the company, was interviewed by --
18 MR. LERMAN: Your Honor, if I may,
I'm going to
19 object to this testimony. This is clearly
beyond expert
20 report disclosure, and it's hearsay.
21 THE COURT: Your client's statement
would not
22 be hearsay. It would be a statement offered by
R.J.
23 Reynolds against R.J. Reynolds. So, it would
not be
24 hearsay under Rule 801.
25 MR. LERMAN: Your Honor, if I can
approach, I

1177
1 have one brief thing I would like to advise the
court.
2 THE COURT: Okay.
3 (The following discussion was
conducted at the
4 side bar between court and counsel, out of the
hearing of
5 the jurors, as follows:)
6 MR. LERMAN: Judge this would be
hearsay --
7 THE COURT: It wouldn't be hearsay
but --
8 MR. LERMAN: Again, this goes to the
issue of
9 not only his expert opinion, but when he was
deposed in
10 this case he was asked if he was going to be
relying on
11 any company documents. He said no.
12 (The following proceedings were
conducted in
13 open court.)
14 Q. Dr. Pierce, I'm going to withdraw that
question as it
15 pertained to what R.J. Reynolds himself may have
said. I
16 want you to focus now on this question. Did
these results
17 that you found in your overall marketing
analysis bolster
18 your conclusion that indeed advertising was
playing an

19 impact in the uptake of adolescent smoking?
20 A. Yes.
21 And the issue was that in that
center period,
22 that was the first advertising to women, and so
we saw big
23 increases in women smoking at that point, but
not much in
24 men. And the first period we saw big increases
in men,
25 again, in each group 14 to 30.

1178

1 Q. So, again there was a correlation between
the
2 advertising and the uptake?
3 A. And it was within the year, and it was
very specific.
4 Q. Now, you mentioned that there were two
prongs to your
5 two paths, I think you said you took; is that
right?
6 A. Yes.
7 Q. Aside from looking at validating the
advertising
8 impact, did you -- what was the second path that
you took?
9 A. Well, the second was to try and look for a
mechanism
10 for how it worked. It's one thing to say
advertising works
11 or it doesn't work. You can show it being very
specific to
12 the years.
13 But the question is, what is, is it
working to
14 encourage people to start smoking. Is it
actually working
15 at the front end. Or is it working on people
who have
16 already decided to smoke in some way it, that
actually
17 they haven't started yet, but they made a
decision to
18 start.
19 So, in other words, it isn't the
primary
20 course. And so, the issue is can we sort that
out.
21 Is it, is it really the thing that is
encouraging people
22 to start.
23 Q. Or other things such as peer pressure,
things of that
24 nature?
25 A. For example.

1179

1 Q. So, you then focused your research efforts
on this
2 question; is that right?
3 A. Well, before we did that we had to start
4 understanding the processes of how people become

smokers.

5 And so we went, went to look at that first.

6 Q. All right. And if we could have 117,
please.

7 Okay, let me see how this works.

All right.

8 That's in color. Dr. Pierce, up on the board
as PDM 0117.

9 Would you refer to it in explaining the
starting process

10 of uptake smoking, how you -- withdrawn.

11 That would you explain what you
found out and

12 the research you did in the terms of the
process of uptake

13 of smoking?

14 A. Well, we defined a group of people who
were

15 susceptible to start smoking who were actually
at risk to

16 start. We were able to show over time that we
could, we

17 were using about three questions, and basically
if they

18 weren't absolutely convinced that they wouldn't
start, they

19 were at risk of starting.

20 And actually to explain that, I do
to my

21 medical students point out if there is, there
is an exam

22 next Saturday and there is a party on Friday
night, will

23 you go? And some of the medical students say
yes, not

24 very many, if it's an important exam.

25 A whole heap of them say, I'm not
going. I

1180

1 probably won't, but I'm not. And what they are
saying is

2 if the context is right, I will. If I've got
all my work

3 done before, if I'm happy where I'm at, I'll
go.

4 If someone I particularly like wants
me to go,

5 maybe I'll go, something of that sort. So,
they are

6 saying from our terminology for smoking they
are at risk

7 to start susceptible, to go, provided the
context is

8 right.

9 So, now we are saying who are these
people who

10 were actually absolutely sure they were not
going to smoke

11 at age 10. We're saying it's nearly 90 percent
of the

12 population. This is a colored version of the
same thing.

13 The what we are looking at, you can
see here
14 the California are data are almost exactly the
same as
15 U.S. data. What we are seeing is when kids get
out of
16 elementary school, they are pretty convinced
they are
17 never going to be smokers.
18 By the time you get down to age 14,
less than
19 half of them are still convinced they are never
going to
20 be smokers. So, we have started the process.
Many of
21 them haven't experimented yet, but they have
started the
22 process towards becoming a smoker, started
moving towards
23 that.
24 Q. So, you are trying to break down the
process by which
25 someone becomes interested in smoking, and
things of that

1181

1 nature actually then starts?
2 A. Yeah, what is relative to this issue of
becoming more
3 susceptible to start smoking.
4 Q. And why were you concerned about
susceptible people
5 versus non-susceptible people?
6 A. Again, as I said, if they were already
susceptible,
7 and that's where advertising was working and
just getting
8 them to the next step, that's not the same as
taking them
9 from the confirmed never smokers, the people who
had been
10 successful with their health education in
primary schools,
11 take them and creating doubt in their mind.
12 Q. Do you have PDM 120? All right. Let me
place on the
13 to board then PDM 110. Okay. Once again, of
what
14 relevance is this in terms of your studying the
process of
15 starting to smoke?
16 A. Well, the first actual behavior is when
they try a
17 cigarette, when they experiment with a
cigarette. And so
18 we need to know when that happens. And I think
the bottom
19 number on there is 12 here, age 12.
20 So, it's a couple years after the
other one.
21 And you can see by about age 12, about 10
percent of the
22 population have already experimented. And by

age 13 it's
23 nearly 20 percent. And it ends up being about
60 percent
24 of the population have experimented with
smoking.
25 But what's important here is if we
look at the

1182
1 20 percent line, the time when 20 percent have
2 experimented to the time that 20 percent have
reached a
3 hundred cigarettes, remember we are talking
about that as
4 the marker for addiction, that's about five
years.
5 So, this process of becoming a
smoker is
6 a longer term process than most people think --
people
7 have tended to believe it's about 2 years,
because some
8 people move rapidly through. And typically
people who
9 move rapidly through, are people whose family
smoke,
10 family members who smoke.
11 And people being concerned about
their, whether
12 there is biological vulnerability or genetic
issues,
13 something like that.
14 But for the average person it could
be as long
15 ago five years in terms of the movement up.
And if we
16 look at that time period, we see they are
progressing and
17 still thinking of doing it, but they just
haven't got to a
18 hundred yet.
19 So, the process is longer than what
we have
20 thought. So, in looking at it, what was
important is,
21 when did they first become susceptible, first
become at
22 risk? And what was associated with that?
Looking at
23 their experimentation, and remember not a lot
of people
24 who experiment go on to be, half go on to
become addicted
25 and going all the way through addiction.

1183
1 And this addiction is not barely
smoking. This
2 is only 5 pack adult amounts. Daily smoking
gets up to
3 10, 15 cigarettes. A little later than that
there is a
4 process by age where at each age you can show

an increased
5 tolerance and increased smoking consumption.
6 Q. And once you identified the process and
were able to
7 divide out the population in terms of their
susceptibility
8 to smoking, how did you then measure the
advertising of
9 that the advertising effect?
10 A. We did most of this research on the
national data
11 because the national data had a lot of these
questions, but
12 they didn't have questions on advertising.
13 And so we needed to actually be sure
that
14 the -- what we were doing was correct in data
without
15 having any advertising in it. And then we went
and looked
16 to see whether our measures of advertising and,
again, you
17 know, were associated with any start of
smoking.
18 Q. And did you, did you apply any kind of
theories,
19 social psychology theories?
20 A. Yes. As I think I said before the lunch
break, there
21 was about a 20 year period of research,
extensive research
22 into how persuasive communications work.
23 Q. All right?
24 A. And that had been covered very
extensively. And so
25 we, I worked for the person who had done it.
So, we

1184
1 actually defined some steps within it that would
show,
2 which we thought would lead to, would show high
levels of
3 susceptibility to advertising.
4 And we said, well, you know, we
think this is
5 the way it goes; is it related to who starts to
smoke.
6 Q. Okay. So, and you lost me a little bit
there?
7 A. Sorry.
8 Q. So, so let me ask it this way. You used
the social
9 psychology theory in trying to figure out the
advertising
10 impact. How did you use this theory?
11 A. I mean, it's not, the theory says in order
to be
12 influenced by persuasive communication, first of
all you
13 have to be exposed to it. Then you need to
attend to it
14 and understand it.

15 And a high level is whether you like
it. And
16 you make some sort of emotional attachment or
commitment
17 to it. And so each one of these, the theory
basically
18 suggests that the higher up on this you are,
the more
19 likely you are to be influenced by the
persuasive
20 communication, or, as we said, more likely you
are to be
21 receptive. You are at the high level of
receptivity.

22 So, we said a person who has a
favorite
23 cigarette, who's prepared to say yes I have a
favorite
24 cigarette and it is Joe Camel, Marlboro, or
Virginia
25 Slims, that person is much more receptive to
advertising

1185

cigarette
1 than the person who said I can't remember any
2 ads, or the person says yes I can remember but
I haven't
3 got a favorite.

4 Q. Once you did the research did you publish
peer review
5 paper on this subject as well?

6 A. Yes, I did.

7 Q. Placing up on the board now, Plaintiff's
Exhibit
8 4609, the first page. And let me just focus in
so you can
9 see the title there. Is that the paper that
your research
10 group published regarding the receptivity to
advertising?

11 A. Well, this one is on promotional
practices. And you
12 know how receptive adolescents were to
promotion. It's one
13 of the things, the problem with the advertising,
the
14 persuasive communications, it didn't talk about
promotions.

15 And promotions during my graduate
work was very
16 important in marketing. And so we said, well,
how do
17 promotions work in terms of marketing.

18 Well, they, if you get one you are
more likely
19 to consume the product. And but if you are
willing to get
20 one, or if you are prepared to use it, you are
associating
21 yourself with the advertising image if you are
prepared to
22 wear a Joe Camel T-shirt.

23 It was really interesting because we
tried that
24 around our office, and nobody over the age of
35 would
25 wear one. A lot of the 18 to 25 year olds
would. So it

1186

1 is who can see themselves in the image of the
product.

2 So, that shows even a higher level of an
identification or

3 receptivity to the advertising.

4 So, what we said here is let's look
at

5 promotional practices. Who's got them, and
who's

6 interested in them. Because there were a lot
of them

7 around.

8 Q. And this was published in 1997; is that
right?

9 A. That's correct.

10 Q. Now, what was the top level, in other
words, in terms

11 of the scale of receptiveness, what was the top
level?

12 A. Well, we had, as our top level, either
having a

13 promotional item no matter how you got it, or be
willing to

14 use one, being willing to wear a T-shirt or
something of

15 that sort. And so we said that's the top level.

That's

16 even more important than having a favorite ad.

17 Q. And in the survey and research you did the
children

18 wind up having promotional materials?

19 A. About 10 percent of our accepting, these
are people

20 who never experienced promotional materials,
yes.

21 Q. And were any promotional materials
received through

22 the U.S. Mail by these people?

23 A. Absolutely, yes.

24 Q. Now, when you looked at this theory and
you developed

25 a baseline of measuring receptivity, what did
you do next?

1187

1 A. Well, the thing that it was missing in the
literature

2 was this temporal association.

3 Q. What do you mean by that?

4 A. Well, the advertising came first before
they started

5 up the process. I mean, does the advertising,
are they

6 receptive to the advertising while they are
still what we

7 are saying is non-susceptible, never smoked?
8 These people who are committed never
to smoke,
9 are they receptive to the advertising, and is
that
10 associated or strongly associated is what we
are really
11 after, if there was any strong association with
who later
12 started smoking.
13 Q. And did you do the research?
14 A. Yes, we did.
15 Q. What did you find?
16 A. We published a paper again in JAMA in
February last
17 year.
18 Q. All right, I'm placing up on the board
again a
19 section of the first page of Plaintiff's Exhibit
4610. Is
20 that the paper that you just mentioned?
21 A. Yes.
22 Q. And where was that published?
23 A. In the Journal of the American Medical
Association.
24 Q. That's a peer review journal?
25 A. Yes, we published a lot of this. The
Journal of the

1188
premier
800
it only
material
it in there.
that they
and
1998, what
you did
are
where the
to peers
level person
name it.

1 American Medical Association is probably the
2 medical journal. It has a circulation of about
3 thousand people.
4 It's published in 8 languages, and
5 accepts about three to five percent of all the
6 submitted to it.
7 So, it's highly prestigious to get
8 So, we thought the work was important enough
9 would be prepared to look at it, and they did
10 published it then.
11 Q. Okay. Now, Dr. Pierce, in this study in
12 were the major conclusions that you found, after
13 the work?
14 A. Well, controlling for other factors that
15 important, in particular for family smoking
16 parents smoke or the siblings smoked, exposure
17 that smoke.
18 There are 4 levels. The minimum
19 who cannot remember any advertising, or can't

20 The low one is the person who can name it, but
does not
21 have a favorite. The medium one, moderate one,
is the
22 person who has a favorite ad but is not
interested in
23 promotional items. And this last one here is a
person who
24 says they are prepared to wear a T-shirt or has
a
25 promotional item themselves.

1189

1 And so what you can see is what we
thought was
2 going to happen. Remember, we said that we did
this
3 before we had the, we followed these people up
over time.
4 We did this. And we said that the lowest level
would, we
5 said there would be an ordered effect.
6 That each level higher would lead to
higher or
7 more progression toward smoking. And what we
saw was that
8 the only two significant effects here were the
promotional
9 items and the having a favorite ad.
10 They looked like a step there, but
it was not
11 significant.

12 Q. And what about the impact of smoking in
the family?

13 A. Well, smoking in the family and exposure
to peers,
14 there is about a 20 percent difference in those
who were
15 exposed to the family or exposed to peers and
who moved up.

16 And remember, this is not, this is
not going
17 all the way to addiction. This is just getting
the first
18 steps. There is about a 20 percent difference
between
19 them, but it was not statistically significant.
20 It turns out this is very different
in terms of

21 people moving from experimentation to
addiction. Moving
22 from experimentation to addiction is strongly
influenced
23 by mere smoking. But the first step was not,
the first
24 step looked like it was strongly influenced.
25 So, the only variable that was
strongly

1190

1 influenced was their response to pack, it is
promotion and
2 advertising.

3 Q. So, when you compared exposure to family
smoking and
4 peer smoking, you still found a high effect of
advertising?
5 A. Yes, that's a threefold figure at 2 at the
top.
6 Q. At the top line at the upper left there is
P.05?
7 A. That means the probability of this
occurring is less
8 than five percent or 1 in 20, which is a
standard
9 statistical test to say if something is
significant or not.
10 Q. Using this statistical test, did you also
estimate
11 what might be the effect of adolescent smoking
of removing
12 tobacco advertising and promotional items?
13 A. Yes we did. With all the other research
we did, we
14 put the conclusion together, we are prepared to
conclude
15 now that tobacco advertising and promotion is
causally
16 associated with adolescents starting to smoke.
17 And then the next question was,
well, how big
18 an effect is it? I mean, it's not the only
thing out
19 there, we know there are other things out
there. How big
20 an effect is it? And in epidemiology we have a
way to
21 calculate that it was initially developed to
decide, in
22 terms of heart disease, was it smoking, was it
23 cholesterol, and how much was attributable to
each one.
24 So it's called the attributable risk
25 calculation. And so we did that on this. And
we said

1191

1 what additional, what excess experimentation do
you get
2 because these people are receptive to the
advertising.
3 Q. And what were the results?
4 A. Well, it's about 34 percent. We worked
out that our
5 best estimate was that the -- having a favorite
ad or a
6 promotional, being receptive to a promotional
item
7 increased the experimentation rate by about 34
percent,
8 which is, if we translate that to the population
to the
9 whole U.S is about 700 thousand kids each year
who would
10 experiment because of the advertising and
promotion.

11 Q. 700 thousand?
 12 A. 700 thousand.
 13 Q. For each year?
 14 A. For each year.
 15 Q. And that's, that was adolescents who start
 to smoke
 16 because of promotional items in advertising?
 17 A. Correct.
 18 Q. Did you work the figures to find out what
 those
 19 figures mean in terms of Ohio population?
 20 A. Well, if we translate it down to the Ohio
 population,
 21 Ohio population is approximately 11 million. Or
 something
 22 of that sort.
 23 And so if we try just to work that
 out compared
 24 to the whole U.S, it's probably around 20
 thousand
 25 adolescents each year, conservatively. I'm
 just doing
 1192
 1 that off the top of my head.
 2 Q. Now, let me ask you a question now about
 trends,
 3 trends in the initiation of smoking.
 4 Does the data suggest that you have
 looked at
 5 and reviewed, in your role as a behavior
 epidemiologist,
 6 suggest that the trends in initiation are
 stable?
 7 A. No, not at all. The Centers for Disease
 Control has
 8 recently used the analysis we worked out for
 when people
 9 start smoking, the incidence of initiation, has
 published
 10 that for the purpose performed from the 1970's
 through the
 11 mid-1990s, for those under the age of 18.
 12 Q. Do we have PDM 109?
 13 A. And they have done this actually for
 experimentation,
 14 which is the first use; and these points, data
 points are
 15 their points.
 16 Q. When you say -- you mean the blue points?
 17 A. The blue points on the curve are the
 actual data
 18 points mentioned by the CDC. And I asked my
 statistician
 19 to model, and just without even looking at the
 data, just
 20 put the data in there and say are there any
 curves, what's
 21 going on, give us a rough draft on it.
 22 And basically what she came up with
 was this.
 23 And it looks like around about 1970, which was
 about the

radio for 24 broadcast of advertising ban on television and
25 tobacco advertising, there was a decline in
1193
1 experimentation with smoking in adolescents.
And this 2 turned around about 1985, which we had
previously 3 identified was, looked like a turn around
period. And 4 that just happens to coincide with the first
release of 5 the Joe Camel promotional T-shirts and things
of that 6 sort.
7 What's very concerning is this huge
increase 8 that's occurred in most recent years in terms
of 9 adolescent experimentation.
10 This other graph that I have on here
is the 11 actual expenditure on tobacco industry
advertising and 12 marketing reported to the Federal Trade
Commission. And 13 you can see that when the decline in smoking
initiation 14 was occurring, the tobacco industry were
increasing the 15 amount of money they spent. And it looked like
it paid 16 off after the mid-1980's.
17 Q. And you mentioned, as you can see the
curve is a 18 concern. What's the concern?
19 A. The concern now is that the initiation
rate, and this 20 is the first use, so the experimentation rate is
now almost 21 as high as it was back around the time of 1970.
22 So, all of the gains that might have
happened 23 in terms of public health movement and
preventing kids 24 from starting to smoke have disappeared.
25 Q. Could we have PDM 108, please.

1194
1 And again what is this, doctor,
peers? 2 A. This is first daily use. So, this is
addiction 3 that's higher. It's even higher than the
hundred 4 cigarettes. So, it's first daily use. And
basically you 5 can see the curve, curve may have gone up a bit
higher 6 there than what the model, the statistical model
plotted. 7 But there was a decline in first

daily use that
8 occurred after the introduction of the
advertising ban on
9 television and radio, and it turned around
again in 1985.
10 And now it appears to be taking off
at a very
11 high rate. It's about a 73 percent increase
through the
12 1990's. And it's very strongly correlated with
the amount
13 of money being spent on advertising and
promotions.
14 Q. Now, Dr. Pierce, has this trend that you
have just
15 referred to on these 2 graphs been translated
into an
16 estimated number of adolescents who today
nationwide are
17 becoming smokers?
18 A. In terms of any given year?
19 Q. Yes.
20 A. Yes, the estimate is that on a daily
basis, there are
21 over 6,000 adolescents experimenting with
smoking. And
22 there is over 3,000 adolescents, I'm talking
under the age
23 of 18, who are becoming addicted on a daily
basis across
24 this country.
25 Q. And what, Dr. Pierce, are the public
health

1195
1 implications if any in these numbers you have
just talked
2 about?
3 A. Well, we tried to calculate that out too
because what
4 we do know from the other research, I've pointed
out to
5 you, is that once a 17 year old reaches a
hundred
6 cigarettes, about half of those people will
smoke for
7 longer than 20 years.
8 The long term data that we know on
smoking
9 behavior is that if you are still smoking at
age 35, 50
10 percent will die of a smoking related disease
at some
11 stage.
12 And so we can see that one quarter
of these 17
13 year olds who have become addicted to smoking
will die of
14 a smoking related disease. And if we did the
calculations
15 over the ten years, the ten years of Joe Camel
in this
16 period where we saw this decline here, it's not

just Joe
17 Camel -- Marlboro was in there in a heavy way
too in terms
18 of its advertising. And we look at this here,
what will
19 that mean in terms of deaths?
20 That increase now will mean
something of the
21 order of 1.2 million extra deaths relating to
smoking that
22 it can be attributed to the tobacco industry
advertising
23 and promotion.
24 MR. CRANDALL: That's all I have,
your Honor.
25 THE COURT: Cross examination.

1196
1 CROSS EXAMINATION
2 BY MR. LERMAN:
3 Q. Dr. Pierce, my name is Brad Lerman. I
represent
4 Philip Morris. I'm going to be asking you some
questions
5 this afternoon.
6 Can we get, doctor, if I understood
the
7 testimony that you just gave, you said that you
had a
8 curve drawn to track the increase of incidence
of first
9 use of cigarettes, and you correlated it with
the
10 introduction of the Joe Camel campaign. Did I
hear that
11 testimony correctly?
12 A. I think what I said was, that we had the
data points.
13 And I had a curve drawn to -- I asked a
statistician to fit
14 actually what's a quadratic curve to the data to
see
15 whether there was any turning points in it.
16 Q. What year was the Joe Camel campaign
introduced?
17 A. 1985.
18 Q. And did you take a look at the actual data
that comes
19 from the mortality and morbidity weekly to see
what the
20 first use rates were for 1985, '86, '87, '88?
Did you look
21 at those numbers?
22 A. You mean, the numbers that are on my slide
on first
23 use?
24 Q. What you drew was a curve that didn't
exactly hook up
25 the dots?

1197
1 A. No curve will exactly hook up the dots. A
curve is

2 meant to be a representation of the data.
3 Q. And sometimes the curve represents a level
that is
4 not equal to the data; is that right?
5 A. Well, data points have error around them.
And a
6 curve is a best estimate of what's going on.
You don't
7 expect trends over time to -- there is a lot of
bounce in
8 the numbers generally.
9 Q. But your testimony was that in 19 -- in
the beginning
10 of the Joe Camel campaign you saw an increase in
first use;
11 wasn't that right?
12 A. I think I said it appears to be the time
at the start
13 of the Joe Camel campaign. Certainly, in other
data we
14 have done in other publications 1995 is clearly
the turn
15 around point in initiation.
16 Q. Okay. Can we get Plaintiff's
Demonstrative 109 up,
17 please. Now, you say the Joe Camel campaign was
introduced
18 in 1985; is that right?
19 A. Yes.
20 Q. Where is that on the chart that you just
put before
21 the jury?
22 A. Well --
23 Q. I noticed you had that laser pointer out.
24 A. If we do it, this would appear to be the
1984 point,
25 and that big jump would be 1985.

1198
1 Q. Is it true that the data that's on that
chart comes
2 from a publication called Morbidity and
Mortality Weekly
3 Report; is that true?
4 A. Yes, I think we cited on the bottom of
that chart.
5 Q. And that's put out by the Center for
Disease Control?
6 A. That's right.
7 Q. That's a publication that's put out by the
U.S.
8 Department of Health and Human Services, and you
rely on
9 than for this data, correct?
10 A. That's where the data came from, yes.
11 Q. Let me show you the actual numbers. Let
me see if I
12 can get these. Focused in from 1985, am I
correct that the
13 level is 111.3; do you see that?
14 A. Could you help me by telling me what's the
heading
15 for the column.

16 Q. Absolutely. Let me move this up. 12 to
17 years,
18 since first use incidence. Am I in the right
column? Is
19 that the right data we should be looking at?
20 A. Well, I'm following your lead.
21 Q. To check what was on that demonstrative,
22 is that the
23 right data that went into it?
24 A. I believe so.
25 Q. And just tell the ladies and gentlemen of
the jury
26 what those numbers mean. 101.3, 88.3; what do
those
27 numbers represent?

1199
What we
a
who
1985, the
1 A. Again, that's the incidence of first use.
2 are talking about here is it's a rate. So it's
3 proportion of people who had not started before
4 indicated that they started in that year.
5 Q. Let's go down to the years in question.
6 level is 111.3. What happens in 1986, doctor?
7 A. It's about 107.0.
8 Q. What happens in 1987?
9 A. 98.8.
10 Q. What happens in 1988?
11 A. Back up to 107.
12 Q. Until 1989?
13 A. 99.
14 Q. And 1990?
15 A. 101.
16 Q. 1991?
17 A. 100.
18 Q. It's not until 1992, seven years later,
that there is
19 a number as large as the 1985 number; is that
right?
20 A. That would appear to be the case, yes.
21 Q. Okay. So, the Joe Camel campaign was in
effect for
22 seven years before there was any appreciable
rise in first
23 use -- in incidence of first use; is that
correct?
24 A. I think what you are forgetting about is
the downward
25 trend that was occurring before that.

1200
1 What we are seeing here is the
downward trend
2 had been completely stalled. And that
certainly as the
3 curve showed, that there was a stall of the
downward
4 trend. And then actually it happens to
coincide with your
5 release of the Camel campaign in 1991. There

started to
6 be this huge increase in first use.
7 Q. Let me ask the question again. As
measured by the
8 CDC, first use initiation for the age group 12
to 17
9 remained essentially flat or decreasing from
1985 through
10 1991, yes or no?
11 MR. CRANDALL: Object. Asked and
answered,
12 your Honor.
13 THE COURT: Overruled. But, I mean,
you can
14 answer yes or no. But if you need to fully
explain your
15 answer, you are not limited to yes or no.
16 THE WITNESS: Thank you. It
certainly wasn't
17 decreasing. It appears to be flat, but a flat
trend is a
18 significant change from the previous trend
period. The
19 previous trend period was a decline of
initiation of first
20 use, which occurred for a 12 year period. And
starting in
21 '85 it appears that that decline halted.
22 Q. No increase during that six years after
the release
23 of the Joe Camel campaign?
24 A. Correct, no decrease either, as we would
have
25 expected.

1201
1 Q. Who would have expected, doctor?
2 A. Well, we are looking at a population trend
which is
3 declining. If any economist or any businessman
projected
4 out from that trend from 1971 to 1995, they
would have
5 plotted a decline for the next six years a
continued
6 decline, and that decline did not occur.
7 Q. Okay. Now, let me ask you this question.
You
8 testified about the smoking rates of physicians;
do you
9 recall, do you remember that testimony?
10 A. Yes.
11 Q. And you testified that the smoking rate of
medical
12 students today is something like one percent?
13 A. I said in about the early 1980's. I don't
have data
14 for it as of today.
15 Q. But approximately one -- some low
percentage; is that
16 correct?
17 A. Correct.
18 Q. Now to what do you attribute that?

19 A. To what do I attribute it? I would
attribute it to
20 the effectiveness of the dissemination of the
health
21 consequences and information. And medical
students, people
22 who wanted to become medical students, were more
conscious
23 of the health effects.
24 And the health effects, weren't the
health
25 effects maybe sufficient to prevent the people
from

1202

1 starting to smoke.
2 Q. Okay. I notice in your answer that you
started
3 talking about people who wanted to become
medical students.
4 Is that because, doctor, it has occurred to you
that by the
5 time somebody is a medical student they have
already gone
6 through adolescence, they have already been
exposed to the
7 advertising you have been talking about, and by
the time
8 they get to medical school at their one or 2
percent
9 smoking rate they have made decisions?
10 Is that why you were talking about
people who
11 wanted to be become medical students?
12 A. People who wanted to become medical
students
13 typically do so before they get into high
school.
14 Q. Would that be at the age of 10?
15 A. Well, they certainly would be on the route
towards
16 doing that, getting into medical school, such as
one in
17 California these days is extremely difficult.
18 They have something like 8,000
applications for
19 less than 90 places. So, unless someone is on
track by
20 age 10, I don't think they will make it.
21 Q. All right, doctor. Is it equally
plausible that
22 medical students go through the same childhood
that every
23 other person goes through, more or less, and is
exposed to
24 the same advertising and the same social factors
that every
25 other child their age goes through; isn't that
plausible?

1203

1 A. I would certainly believe that the medical
students

2 have been exposed to the same advertising and
promotional
3 items, probably.
4 Q. And go through the same insecurities of
childhood and
5 the traumas of adolescence and puberty and the
traumas of
6 peer pressure and trying to fit in, don't they
go through
7 that as well in their lives, Dr. Pierce?
8 A. I'm not an expert in that area, but I
would presume
9 they do.
10 Q. But now when they grow up, they smoke at a
one or 2
11 percent rate?
12 A. Correct, sir.
13 Q. And you can't explain that by whether or
not they are
14 exposed to advertising; can you?
15 A. I don't think we are talking about
exposure to
16 advertising anywhere. We are talking about
receptivity. I
17 would say they were not receptive.
18 Q. You say we are not talking about exposure
to
19 advertising?
20 A. I think that when I'm talking about
someone having a
21 favorite ad, which is what we said is important,
that's far
22 more than exposure. We had people who said I
don't have a
23 favorite ad. I object to all advertising.
24 Q. So exposure would be the wrong term?
25 A. Exposure is necessary before you can go
any further.

1204

1 Q. But you are not measuring exposure. You
are
2 measuring receptivity?
3 A. Receptivity, yes.
4 Q. Can I see Plaintiff's Demonstrative 110,
please.
5 Doctor, look at the chart on the far right?
6 A. Yes.
7 Q. What is the title of that graph there?
8 A. The graph says, let me read it from here.
Exposure
9 to Tobacco Promotions and Advertising.
10 Q. What's -- the problem with this is not
what you were
11 measuring, it is what you weren't measuring.
12 MR. CRANDALL: Object, compounded.
2
13 questions, your Honor.
14 THE COURT: I don't understand the
question.
15 BY MR. WEBER:
16 Q. Doctor, are you measuring exposure to
tobacco

17 advertising or not?
18 A. Well, certainly the people in the upper 3
groups were
19 exposed to advertising. I would say that that
is an
20 incorrect label on that graph. And most other
places we
21 have used receptivity.
22 What we have been trying to do is
present our
23 information in a way that doesn't become too
confusing. A
24 lot of people have got confused between the
words
25 susceptibility to smoking and receptivity to
advertising.

1205
1 So, we have tried to simplify it down.
2 And clearly in doing so we have lost
some of
3 the accuracy there of what we have done.
4 Q. Okay. Well, I want to get into
receptivity and
5 susceptibility with you. But let me turn to
something
6 else. You talked about the Virginia Slims ad
campaign; is
7 that right?
8 A. Correct.
9 Q. Now, when did that ad campaign begin?
10 A. You are asking me about the Virginia Slims
itself?
11 The advertising we were looking at there with
the brand was
12 for all of the women's brands that was Silva
Thins, Eve,
13 and Virginia Slims.
14 Silva Thins, I remember, started in
1967. I
15 think Eves started the same time, I think, and
I may be a
16 little wrong on this -- and I'm sure you'll
correct me --
17 1968 mid-1968 is probably when Virginia Slims
started.
18 Q. And were there any other -- well, let me
ask you
19 this, doctor. 1968, and thereabouts, would you
agree with
20 me that there was great energy in this country
on behalf of
21 women to achieve a certain amount of equality;
would you
22 agree with me?
23 A. The Women's Liberation Movement, as it has
been
24 labeled, was certainly in force. And so I would
think
25 that's fairly representative statement.

1206
1 Q. For instance, in 1963 are you familiar

with an author
 2 named Betty Friedan wrote a book called the
 Feminine
 3 Mystique?
 4 A. I know the book.
 5 Q. Are you familiar with the formation of the
 National
 6 Organization for Women?
 7 A. I'm not, I'm not a student of the women's
 movement.
 8 And so I wouldn't be familiar with these, but
 I'm assuming
 9 you have the data.
 10 Q. And the Equal Pay Act, are you familiar
 with that?
 11 A. I know that exists.
 12 Q. And the Equal Rights Amendment, are you
 familiar with
 13 that?
 14 A. Yes.
 15 Q. In fact, at that time in this country, the
 late
 16 1960's and the early 1970's, there was
 tremendous social
 17 pressure for women to be treated equally with
 men, wasn't
 18 there?
 19 A. Well, I haven't got a measure of that, so
 I can't
 20 really answer.
 21 Q. And is it your testimony, doctor, that
 this social
 22 dynamic of women's equality played no role in
 women
 23 deciding to smoke more? Is that your testimony?
 24 A. I didn't testify to that. What I said is
 that the
 25 uptake of smoking in adolescent girls was
 completely
 1207
 1 coincident with the conduct of advertising
 campaigns
 2 for the first women's cigarettes.
 3 Q. Now, you testified about the fact that
 sometimes in
 4 order to decide causation you have got to decide
 which came
 5 first, sort of a chicken and egg problem,
 correct?
 6 A. Correct.
 7 Q. And you know that especially in consumer
 product
 8 marketing sometimes products are, and brands are
 created to
 9 meet a growing demand in the marketplace. You
 know that,
 10 don't you?
 11 A. That can happen, yes. That's one reason
 for creating
 12 a brand.
 13 Q. And with this women's social movement
 occurring in

14 the '60's and '70's, you know that the tobacco
companies,
15 as well as other companies in this country that
produced
16 consumer products, started advertising and
creating brands
17 especially for women?
18 A. I don't think that was -- I could give you
a number
19 of other reasons -- let's try a reason for it
again. In
20 1967 was the --
21 Q. Doctor, if I could get an answer first to
my
22 question?
23 THE COURT: He can answer the
question. Is
24 this answer in response to the last question?
25 THE WITNESS: I'm starting to forget
the

1208

1 question, judge, I'm sorry.
2 BY MR. LERMAN:
3 Q. Let's clear the page and we'll start over.
4 There were other consumer products
that had
5 women's type brands being created at that time,
weren't
6 there?
7 A. I wouldn't know that.
8 Q. It wasn't just cigarettes, was it, Dr.
Pierce?
9 A. I wouldn't know that.
10 Q. Would that be something that you would
want to know
11 before you make the conclusion that the rise in
women's
12 smoking rates was due to the Virginia Slims
advertising
13 campaign?
14 A. I think I said coincident with. I didn't
say it was
15 caused by. The causal association is, is made
from looking
16 at the totality of evidence at the time.
17 If we are thinking in terms of you
are
18 postulating reasons why the cigarette industry
might
19 create a new brand. What we did know at the
time is in
20 1967 there was a lot of quitting going on in
men, and it
21 looked like the industry was losing a major
market share
22 in men.
23 And so I wouldn't be surprised if
that was one
24 of the reasons that the industry looked at
brands for
25 women. I wouldn't know about the other issues.

1209

1 Q. All right, doctor. Do you understand that
as an
2 expert in this trial, when you testify to this
jury
3 they are going to be listening to you as an
expert witness;

4 do you understand that?
5 THE COURT: You need to ask a
question. Ask a

6 question.
7 BY MR. LERMAN:
8 Q. Doctor, is it your testimony then that the
Virginia

9 Slims advertising campaign did not cause or
cannot be said
10 to have caused significant rise in women's
smoking?

11 A. I think what I said in my testimony was
that it was,
12 it was coincidence completely; that the
coincidence was

13 pointed out to us at the time.
14 And so consequently we went back or
we looked
15 at other innovative advertising campaigns. And
if you
16 like, I can take you through that data which
shows you

17 that when the industry did the health
campaigns, the ones
18 that they were, the Federal Trade Commission
told them to
19 cease and desist in 1940 because they were
false and
20 misleading when they did those health
campaigns, which
21 always had women in them. That we saw a major
increase in
22 14 to 17 year old initiation of smoking in
women.

23 The same occurred in 1925 to '29
when reach for
24 a Lucky instead of a sweet, when the image was
of a woman
25 with a huge shadow behind her warning her that
if she

1210

1 reached for a sweet, she would gain weight
rapidly,
2 whereas if she smoked, she wouldn't, there was
a huge rise
3 in adolescent smoking at the same time.

4 Also, both of those times the rise
occurred in
5 young adult women. So, what I've said, it's
like a light
6 switch. It doesn't just happen once. It
happened once
7 with Virginia Slims. It happened also with the
health
8 effects campaign.

9 It happened also with the reach for
a Lucky
10 campaign. It happened also for men with the
Camel
11 campaign. And I think the CDC data
demonstrates it has
12 happened recently with the Joe Camel campaign.
13 Q. Doctor, isn't it true there has been
cigarette
14 advertising consequently in this country for
about the last
15 90, a hundred years?
16 A. I think 1988 was the first major campaign,
but it had
17 probably gone on before that.
18 Q. Isn't it true that cigarette marketing and
19 advertising has been the important feature of
selling of
20 cigarettes in this country during that time
period?
21 A. Yes, I believe that that would be the
case.
22 Q. Is there ever going to be a time, doctor,
where
23 cigarette consumption will be on the rise where
you won't
24 be able to point to some ad campaign that is
going on at
25 the same time?

1211

1 MR. COUGHLIN: Object.
2 THE COURT: Overruled.
3 A. I think in the Virginia Slims period we
are seeing
4 consumption going down. If you look at that
consumption
5 going down, and Virginia Slims is associated
with women
6 going up, young women, and with the Joe Camel
campaign you
7 are seeing consumption levels going down, it
appears the
8 effects of advertising seems to be with
adolescents, and
9 adolescents only take up one or 2 percent of the
10 consumption level at any particular point in
time.
11 So, therefore, what we are seeing
affect
12 specific to the adolescents, when there is a
time period,
13 there is a decline in consumption. So, I think
it is
14 quite opposite of what you said.
15 Q. Maybe I'm not being clear. What I'm
saying, doctor,
16 at any time there is a change in the smoking
behavior of a
17 particular group, will it not be the case that
there is
18 some advertising campaign going on at that time
for a brand

19 of some cigarette?
20 A. Probably, unless of course there is an
advertising
21 ban.
22 Q. And I want to talk to you about that as
well. Can we
23 put Plaintiff's Demonstrative 112 up on the
screen.
24 Doctor, this is the per capita
cigarette
25 consumption chart that you testified to. There
is one

1212
is that
1 like this in the 1989 Surgeon General report;
2 right?
3 A. Correct.
4 Q. Okay.
5 A. This actually goes a lot further out. You
will see
6 it's after 1995.
7 Q. You added some years at the end, whereas
the 1989,
8 report would have, 88?
9 A. 1989.
10 Q. You talked about the effect of advertising
on
11 consumption rates and how it caused
differentiation in
12 consumption patterns; is that right? You just
did that
13 right now, didn't you?
14 A. I'm repeating your words there. I'm not
sure that --
15 Q. Well, let me just be direct. Didn't the
Surgeon
16 General report in 1989 conclude that there was
not one
17 scientifically accurate longitudinal study that
proved that
18 cigarette advertising caused increased demand;
isn't that a
19 conclusion from the Surgeon General?
20 A. Yes, the conclusion was that, the studies
hadn't been
21 done, and the frustration of Surgeon General
Koop at the
22 time was that given the way the studies were
being done and
23 given the saturation of advertising, that he
didn't think
24 with the tools we had available at the time that
we would
25 ever be able to identify whether advertising had
an impact

1213
1 or not.
2 Q. So, in 1989 the conclusion was you
couldn't prove
3 what you have just testified to before this
jury; is that

4 right?
5 A. Certainly, that was the challenge I took
up.
6 Q. The challenge you took up was somehow to
prove it,
7 right?
8 A. I'm sorry, I think the challenge I took up
was to
9 test for a hypothesis.
10 Q. It had been tested, doctor. There had
been a lot of
11 research about the effect of advertising on
demand, hadn't
12 there?
13 MR. CRANDALL: Object, compound.
14 THE COURT: Why don't you rephrase
the
15 question.
16 Q. There had been a lot of research done on
effect of
17 advertising for cigarettes, hadn't there?
18 A. Yes, but not amongst adolescents. The
research that
19 was done looked at total advertising dollars and
total
20 consumption and tried to correlate the two.
21 And as we have pointed out a little
bit, it's,
22 I think, in the last response to your last
question, the
23 consumption has been going down, but
advertising had a big
24 effect on adolescents.
25 And until you can actually look at
the subgroup

1214
1 that the advertising is impacting, until you
can come down
2 to we had to design incidence of initiation, we
have to
3 come up with a measure where we could identify
the number
4 of non-smokers who started smoking in any given
year.
5 And then we had to also say, well,
there is a
6 whole theory of persuasive communications and
how they
7 work. And it hasn't been tested. What people
have done,
8 they just looked at total advertising dollars.
And, I
9 mean, everyone can talk about a product that
had a huge
10 advertising market and didn't get any
consumption.
11 It's not just the amount of money
you put into
12 it. It has to be, there is a lot of other
things relating
13 to the message and whether it works or it
doesn't.

work in 14 Q. Doctor, you recently won an award for your
states; is 15 evaluating tobacco control programs for various
16 that right?

17 A. For my work in epidemiology which was
demonstrated by 18 that sort of work, yes.

19 Q. Part of what you have done, part of what
you have 20 studied is the effectiveness of regulations by
state and 21 local governments regarding tobacco use; is that
right?

22 A. Well, I think it's not just regulations.
There was 23 an anti-smoking campaign I looked at between
1983 and '87. 24 We did a study of a media led something, a lot
of 25 television ads, anti-smoking campaigns in
Sidney,

1215

1 Australia.
2 And between 1990, and the last paper
was 3 September last year, '98, we have looked at
whether the 4 something like \$40 million a year being spent
in 5 California has had an impact on smoking
behavior.

6 And that's from television
advertising for 7 different groups. It also, there are
regulations that 8 have gone with it. Smoke free work sites,
interesting 9 enough, probably one of the big issues has got
nothing to 10 do with regulation. It has to do with people
putting a 11 voluntary ban smoking in their own home,
smokeless. And 12 that's been increasing dramatically. In
California about 13 40 percent of smokers now will not smoke in
their own 14 home, so they don't expose non-smokers to the
harmful 15 effects of it.

16 And that, I mean, there are a lot of
things 17 going on in terms of smoking behavior. And we
have been 18 studying that carefully.

19 Q. Let me see if I can -- maybe I'm asking
questions 20 that are too broad. Let me see if I can keep
them more 21 narrow?

22 MR. CRANDALL: Object to the

preface, your

23 Honor.

24 THE COURT: Overruled, just go ahead
and ask
25 the question.

1216

1 BY MR. LERMAN:

2 Q. Doctor, is one of the important aspects of
regulation
3 by local and state authorities enforcement of
access

4 restrictions to minors for cigarette products?

5 A. Sorry, repeat the question.

6 Q. Is the enforcement of youth access laws
important in

7 smoking initiation rates for adolescents?

8 A. Many people who run these campaigns think
it is.

9 Q. And is it important for states to have
those laws and

10 enforce those laws?

11 A. Well, our data suggest that it's very
difficult

12 for -- adolescents feel it is very, feel it's
very easy to

13 get cigarettes, irrespective of what the laws
say. And it

14 appears that there are many merchants who are
prepared to

15 sell to minors as young as 12 years old whether
it is

16 against the law or not.

17 And we are starting a study at the
moment to

18 see whether the tobacco industry incentives to
these

19 merchants are related to that. I think the
industry

20 spends something like \$1.4 billion each year
supporting

21 level vendors. And the question is why do
people at this

22 day and age want to sell cigarettes to 12 year
olds.

23 Q. And you would agree with me that if laws
were in

24 place and enforced, that would help cut down on
youth

25 initiation?

1217

1 A. Well, if the law could be enforced, maybe
it would.

2 I think we have a recent paper which suggests
that it

3 wouldn't have any effect on initiation too much,
because

4 kids don't start buying cigarettes until they
are smoking

5 at least one cigarette a day.

6 So, they are already addicted at
that stage.

7 And you tell them they can't buy, and they'll
ask someone
8 else to buy for them. And half the 17 year
olds and 16
9 year olds in California are asking someone else
to buy
10 cigarettes for them, and a friend is just a
little older.
11 But the issue is they have already
experimented
12 before then. We worked out what would be the
generosity
13 quotient and what we call the generosity
quotient. What
14 we are saying is if all those who were buying
cigarettes
15 were going to provide the cigarettes for their
friends who
16 are still experimenting, how much extra would
they have to
17 pay? I mean, how much, what's the cost of
cigarettes. It
18 doesn't fit.
19 Q. If I could, let me proceed with what I was
asking
20 you. I've got a lot to cover with you. You
talked about
21 the television ad ban in Australia; do you
recall that
22 testimony that you participated in the
recommendation to
23 ban television advertising for cigarettes in
Australia?
24 A. I said I think I wrote an editorial
relating to a
25 paper which actually showed that advertising was
the main

1218

1 predictor of which adolescents started to smoke.
2 Q. And that paper would suggest that if
television
3 advertising were banned in Australia, that
consumption
4 would go down?
5 A. Well, television advertising had been
banned in
6 Australia for a lot longer than that.
7 Q. From the time you wrote your paper?
8 A. Yes, television at the time being was made
in
9 Australia in 1975, 1976.
10 Q. And what was the effect of consumption of
that ban?
11 A. On total consumption? I think that we
didn't have
12 good data going back, like happened in the
United States.
13 And between 1974 and '84, the consumption level
was flat, I
14 think, actually prevalence, we are talking
smoking
15 prevalence then at that stage, I didn't have.

16 I don't think I've ever reported on
per capita
17 consumption in Australia.
18 Q. Would you agree the results of the ban on
television
19 advertising in Australia had no effect on
aggregate
20 cigarette demand; would you agree with that?
21 A. As I said, I wouldn't know.
22 Q. All right. Dr. Pierce, you are not
rendering an
23 expert opinion in this case regarding the intent
of the
24 defendants, are you?
25 A. No, I don't believe so.

1219
1 Q. Okay. You are talking to the ladies and
gentlemen of
2 the jury purely on your measurements that you
have made of
3 the effect of advertising on initiation among
adolescents;
4 is that right?
5 A. I think I'm speaking from my body of
knowledge of
6 research and from what I've looked at over the
last 20
7 years or so which includes issues relating to
smoking
8 behavior, it includes looking at advertising
campaigns the
9 industry had at different times.
10 You know, as I said, Virginia Slims
we had the
11 time period relating to that. The Silva Thins
and the
12 Lucky Strikes going back that far, the early
Camel stuff,
13 and actually went back to James Duke.
14 And so I think, I think that my
expert
15 testimony relates to -- I'm prepared to talk
about things
16 I know about.
17 Q. Okay. Doctor, I want to talk to you about
your 1998
18 study, which was the first study to purport to
show over
19 time that cigarette advertising has an effect on
teenage
20 smoking.
21 That study began with a survey of
teenagers in
22 1993; is that correct?
23 A. Correct.
24 Q. And, in fact, to prepare your study you
talked to
25 5,531 teenagers between the ages of 12 and 17,
is that
1220
1 right?

2 A. It wasn't to prepare the study. What we
were doing
3 was a random sample of the population of
California as part
4 of the evaluation for the California tobacco
control
5 program. But that was the number of adolescents
we talked
6 to.
7 Q. And you and the people working with you,
and there
8 were other people working with you, correct?
9 A. Absolutely.
10 Q. You conducted these interviews over the
telephone?
11 A. We didn't conduct them. We hired one of
the most
12 reputable health survey units to do so.
13 Q. And they talked to 5,531 individuals
between the ages
14 of 12 and 17, correct?
15 A. Correct.
16 Q. Without ever meeting them, correct?
17 A. Correct.
18 Q. And they asked them a series of questions
regarding
19 friends and family and attitudes towards
smoking; is that
20 correct?
21 A. Well, there were many more questions than
that, but
22 those were included.
23 Q. Okay. And from this group, from this
interview you
24 identified a certain group of these 12 to 17
year olds that
25 are what you call never smokers; is that right?

1221
1 A. Well, we can identify a lot of groups.
That paper I
2 think looks at non-susceptible non-smokers.
3 Q. And I'm getting to that. I'm taking it
step by step.
4 You identified a group that were never smokers;
is that
5 right?
6 A. No, we never did that because we already
had our
7 model of how people start. And again we had
people who
8 were firmly committed that they would never
smoke. And
9 then we started with that group exactly.
10 Q. So, in order to identify the people who
were firmly
11 committed never to start smoking, there were
several
12 criteria that had to be met. One of them was
that they
13 never smoked, correct?
14 A. Of course.
15 Q. Okay. And sometimes those are referred to

as never

16 smokers; is that right?

17 A. Someone who has never had a cigarette or
even a puff,

18 I think we just had.

19 Q. Even a puff?

20 A. Even a puff.

21 Q. One puff, and you are no longer in the
category of a

22 never smoker?

23 A. Exactly.

24 Q. And then you asked three questions to
determine what

25 you called susceptibility; is that right?

1222

1 A. Correct.

2 Q. Now, susceptibility is your term; isn't
it?

3 A. It's a term we defined, yes, in previous
work.

4 Q. Okay. It's a term, it's not a term that
is found in

5 other marketing literature, is it? It's a term
found in
6 your work?

7 A. No, I think you'll find it in psychology
work. I

8 think there has been four separate replication
of data all

9 showing that susceptibility as defined by it is
similar to

10 ours was double the chances a never smoking
person would

11 become a smoker.

12 Q. Let me show you what's Defendant's
Demonstrative

13 6596, I believe.

14 And I want you to look in the left
hand column,

15 doctor, where it says 1993; do you see that?

16 A. Yes, I do.

17 Q. In that column there are three questions
listed. Are

18 those the questions that needed to be answered
by never

19 smokers in order to place them in the category
of

20 non-susceptibility never smokers?

21 A. Let me read it for the jury first. One
says, do you

22 think you will try a cigarette soon? The second
one is, if

23 one of your best friends were to offer you a
cigarette,

24 would you smoke it? And the third one is, at
any time

25 during the next year, do you think you will
smoke a

1223

1 cigarette? Those are the 3 questions.

2 Q. And in order to be a non-susceptible never

smoker,
indicated on 3 you had to answer each of those questions as
4 that chart right now; is that correct?
5 A. The first question was coded as -- you
understand 6 what we do in our survey, we use capital letters
when we 7 leave an open ended response. So, the first one
says do 8 you think you will try a cigarette soon?
9 And an adolescent might have said I
might. So 10 the interviewer then coded that, so we coded
that as a yes 11 or no.
12 And the other ones that are in the
smaller 13 type, they were given the choices of.
14 Q. All right. And they responded, 12 to 17
year olds, 15 when he is asked if one of your best friends
would offer 16 you a cigarette, would you smoke it? If he
answers 17 anything other than definitely not, you will not
categorize 18 him as a non-susceptible never smoker?
19 A. Correct.
20 Q. In other words, any answer other than
definitely not 21 takes you out of the category of
non-susceptible, right? 22 A. The concept is they have to be committed
to never 23 smokers.
24 Q. The next question, do you think -- at any
time during 25 the next year do you think you will smoke
another

1224

1 cigarette?
2 Unless you answered definitely not,
you don't 3 believe they would fit the criteria for
non-susceptible? 4 A. That's correct.
5 Q. And so this survey was run. And as a
result of the 6 answers to these questions, you were able to
identify what 7 you called non-susceptible never smokers; is
that right? 8 A. Yeah, sure.
9 Q. And do you remember how many you were able
to 10 identify in that regard?
11 A. Not off the top of my head. But I think
you have got 12 it in the paper there.
13 Q. Is it 1752?
14 A. That sounds right.

these 15 Q. Now, you have got some other data from
Is that 16 non-susceptible never smokers; is that correct?
called 17 correct, and that data went to what you have
18 receptivity?
19 A. Correct.
about 20 Q. And these are the questions that you asked
21 receptivity. The first one, and I'll read them.
22 Some tobacco companies provide
promotional 23 items to the public that you can buy or receive
for free. 24 Have you ever bought or received for free any
product 25 which mentions a tobacco brand or which was
distributed by
1225
1 a tobacco company?
2 Question 2. Do you think you would
ever use a 3 tobacco industry promotional item such as a
T-shirt? 4 If the respondents answered yes to
either one 5 or two, you categorized them as having high
receptivity? 6 A. That's correct.
7 Q. The third question was: Think back to the
cigarette 8 advertising you have recently seen on billboards
or in 9 magazines. What brand of cigarettes was
advertised the 10 most? If they were able to name a brand as a
result of 11 that question, you categorized them as having
low 12 receptivity; is that correct?
13 A. That's correct.
14 Q. All right. And the fourth question is:
What is the 15 name of the cigarette brand from that
advertisement? 16 And
17 if there was a hesitation or they could not
answer, of all 18 the cigarette advertisements that you have seen
which do 19 you think attracts your attention the most?
20 And if they could not name a brand
or would not 21 name a brand, you gave them a minimal
receptivity; is that 22 correct?
23 A. Correct.
24 Q. Okay.
25 A. No. To that, to the fourth question.
Q. Yes.

1 A. The fourth question separates out those
between low
2 and moderate. Minimal is someone who can't
remember any
3 brand at all. A high level is someone who's
prepared to
4 wear a T-shirt. A moderate level is a person
that has a
5 favorite ad. And the low level is the person
who names a
6 brand but is not prepared to say they have a
favorite ad.
7 Q. I'm sorry, doctor. I read that wrong and
I
8 apologize.
9 Now, let me ask you this, Dr.
Pierce. When you
10 ask a 12 year old, do you think that you would
ever use a
11 tobacco industry promotional item such as a
T-shirt, do
12 you think that a 12 year old who says he would
wear a
13 T-shirt is receptive to tobacco advertising?
14 A. I have a 12 year old, and my 12 year old
is very
15 careful, very careful actually about what
T-shirt she will
16 wear.
17 If my 12 year old says she will wear
a Joe
18 Camel T-shirt, she's susceptible to Joe Camel
advertising,
19 because the Joe Camel T-shirt is the actual
image related
20 in the advertising, so, she would be relating
to it.
21 Q. When you ask a 12 year old if they
received for free
22 any product which mentions a tobacco brand or
was
23 contributed by a tobacco company, and they say
yes, does
24 that make them highly receptive to tobacco
advertising?
25 A. Well, that was a conservative decision we
took. We

1227

1 decided that if they got a promotional item,
they were
2 probably receptive to it in some way. But the
effect, if
3 they weren't, the effect would be to reduce the
chances of
4 that showing any influence in terms of starting
to smoke.
5 So, it was a conservative decision.
The
6 conservative decision was to bias it towards
not finding
7 effect. So, at that time what we decided to do
--

8 Q. Now, isn't it possible that any 12 or 13
year old
9 that has a tobacco promotional item obtained it
from a
10 relative or a parent or a sibling who's a
smoker?
11 A. Absolutely.
12 Q. And doesn't this question then, question
number 1,
13 doesn't it actually serve as an indicator for
whether a 12
14 or 13 year old is growing up in a family where
there is
15 smoking or has friends who smoke?
16 A. Or relatives. Now, there are, I think if
we look at
17 where people get their promotional items, the
industry
18 hands them out at fairs. And it is very clear,
I think we
19 covered the issue, a number of people got it
through the
20 U.S. Mail in response to filling in a survey or
something
21 of that sort.
22 The number of 12 year olds said they
got it in
23 coupons from the catalogs. And the catalogs,
that means
24 they have got to say they are 21, so they have
no
25 compunction in doing that, and they still
receive an item.

1228

1 I think there are many ways that people get it.
I don't
2 think just because someone has a promotional
item that
3 means their families are all smokers.
4 Q. But a 12 or 13 year old that has a
promotional item
5 from a tobacco company could well have gotten it
from a
6 parent, a brother, a sister, a friend; is that
right?
7 MR. CRANDALL: Objection, asked and
answered.
8 THE COURT: I think he has answered
it.

9 BY MR. LERMAN:

10 Q. Now, after this survey was done and the
data was
11 collected on the 1700 non-susceptible never
smokers, you
12 never remained in contact with them for the next
three
13 years; is that correct?
14 A. We didn't, this was done a little
differently to most
15 longitudinal studies, studies where you follow
people back
16 over time. What you normally do up front is you

say now we
17 would like you to be involved in a study for
three years.
18 Will you be here in three years to answer our
questions,
19 and will you give me a commitment that you will
do that?
20 And a lot of people say no. And
when they say
21 no, you count them out of the survey. We do
not want to
22 do that. We didn't even tell them about the
survey in
23 three years time. We said we didn't have money
for it.
24 So, we weren't sure we were going to do it. We
just said
25 will you answer our questions now. And they
did. And

1229
can find
1 then three years later we said let's see if we
2 them and, you know.
3 Q. Doctor, isn't it a fact that at the time
you
4 collected the data in '93, you expected to be
back in touch
5 with these people earlier than three years;
isn't that
6 true?
7 A. No, I don't think that's true. We
certainly did not
8 have the money to do it. And without the money,
you
9 wouldn't expect to do it.
10 Q. Isn't it true that you lost the funding in
1993?
11 A. Beg your pardon?
12 Q. Isn't it true you lost the funding to
carry through
13 the study some time after 1993?
14 A. I've never lost funding to carry out a
survey.
15 Q. Isn't it true, doctor, because of your
funding
16 problems you weren't able to re-contact these
kids for
17 three years; isn't that true?
18 A. I repeat, I have never lost funding for a
study I
19 have been on. And what you are inferring is
that we were
20 funded to do a project and we were not
performing and so
21 consequently we lost our funding. This is
completely
22 false.
23 Q. Doctor, I'm sorry if you take that
inference, because
24 I want to be clear with you I am not trying to
infer or
25 imply that at all.

1230

1 What I'm saying is, as a practical
matter, as a
2 practical matter you did not have the funding
to follow up
3 with these kids as quickly as you would have
liked to; is
4 that correct?
5 A. I don't know whether it is as quickly as
we would
6 have liked to. We certainly, since then we
followed up at
7 three years. We are actually in the field now
which is a
8 further three year follow up on another sample
which is
9 exactly the same design.
10 The issue of choosing three years, I
think I
11 pointed out to you, there is a five year time
span between
12 movement from experimentation even up to a
hundred
13 cigarettes; you don't want to get it in too
close. You
14 need a chance for these people to actually have
made
15 transitions to smoking and become smokers.
16 So, we picked three years as the
ideal time.
17 And we have got an application now to further
follow up
18 these people in another three years. So there
will be a
19 three year break, and another three year break.
20 So, I really object to you
characterizing my
21 statements in terms of the research as an --
I'm an
22 ineffective researcher, I have done something
to lose
23 funding or to compromise my design in a way
that, because
24 of something that's been done.
25 Q. Now, doctor, during the three year period
between '93

1231

1 and '96 you didn't keep up with the kids; is
that right?
2 A. Correct.
3 Q. And in fact when you went to re-contact
them, you
4 couldn't find a proportion of them; isn't that
right?
5 A. Right.
6 Q. And in fact you were unable to locate more
than 25
7 percent of them?
8 A. I thought we were lucky to get as many as
we did.
9 Los Angeles, we had been in a study to quit

smoking and
10 smoking hot line as well. And the average, in a
few weeks
11 after we called, they called up, we called them
back, and
12 25 percent of them were gone. So, given that we
are in
13 large cities on the west coast, we thought we
did pretty
14 well to find the ones we did.
15 Q. So, my question was you were not able to
locate over
16 25 percent of these kids after three years?
17 A. Right.
18 Q. And in fact of the original 5531, you were
only able
19 to follow up with 3,376; isn't that correct?
20 A. Correct.
21 Q. So, you lost almost 2,000 respondents
between 1993
22 and 1996, correct?
23 A. I don't like that characterization. As
I've pointed
24 out to you, if I had gone into the study like,
for example,
25 if I did this the same as I'm doing my breast
cancer

1232
1 research where we have women who have had breast
cancer who
2 we want to involve in a study over a period of
four years.
3 At the end this study will take four years, and
this is
4 what I need you to do in that time. Will you
commit to
5 doing that?
6 When I do that I lose 60 percent of
the women.
7 Women will say I will answer the questionnaires
once, but
8 I won't stay in a study for four years. And so
I lose a
9 lot of people.
10 And then I take that, and I say that
is my, the
11 people that volunteered to stay in the study,
and then we
12 look at, follow up, and that's what we call
response rate.
13 And you expect to get -- in my case
I'm
14 expecting to get 98 percent of these women to
follow them
15 over time.
16 And so because we didn't do that,
the 26
17 percent who we couldn't re-contact are not the
same as to
18 say you lost them to the study. You couldn't
re-contact
19 them. They would have refused in the first

place to stay
20 in the study.
21 We had something like a 7 percent
refusal rate
22 of the people, once we contacted them. I think
it was 1.2
23 percent of parents said no, I don't want you to
talk to my
24 child any more. And I think it was about five
percent of
25 the kids that said no thanks, I don't want to
talk to you

1233
1 again.
2 And so the refusal rate and the loss
to follow
3 up based on that was 7 percent. It is not like
we lost
4 all these other people. They wouldn't have
even been in
5 the study in the first place if it was a proper
6 longitudinal study.
7 Q. After the three years had passed, 12 to 17
year olds
8 had now become 15 to 20 year olds, correct?
9 A. Correct.
10 Q. So that those who were 12 years old maybe
in the 6th
11 grade, are now in high school, correct?
12 A. If may be they were in 6th. They were
probably in
13 high school if they passed.
14 Q. And those who were in high school are now
in college.
15 You have got 18, 19, 20 year olds in your survey
at this
16 point, don't you?
17 A. Yes, correct.
18 Q. And the 18, 19, 20 year olds, that's the
age at which
19 they can lawfully make the decision to smoke;
isn't it?
20 A. Correct. I can make a decision to smoke
at any time.
21 It's not unlawful for anyone to smoke.
22 Q. They can lawfully purchase cigarettes,
right?
23 A. They can buy cigarettes, yes, in most
places.
24 Q. Now, at this point three years later you
are going to
25 take a look at the kids who come back, or the
participants

1234
1 in this survey who come back, some are not kids
any more,
2 and follow up with them as to what's happened in
terms of
3 seeing whether they remain non-susceptible never
smokers,
4 is that right?

5 A. Well, what I wanted to do is to see
whether any of
6 the things they told us at baseline predicted
their later
7 smoking behavior. So, I was particularly
concerned to say,
8 well, if they were receptive to cigarettes at
base line
9 when they were 12, they were receptive when
we've gotten
10 15, were they more likely to be smokers. And
the answer
11 was yes. And the same happened at the later
stage.
12 THE COURT: How much more do you
have?
13 MR. LERMAN: This might be a time
for a break.
14 THE COURT: We are going to take
just about ten
15 minutes. At 25 after be back in the jury room.
So, we'll
16 stand in adjournment until that time.
17 (brief recess)
18 THE COURT: Please be seated. Mr.
Lerman.
19 BY MR. LERMAN:
20 Q. Thank you, your Honor. Dr. Pierce, just
to put us
21 back in context, in 1993 you identified
non-susceptible
22 smokers, 2,364 such non-susceptible smokers in
1993?
23 A. I believe so. I don't have those notes in
front of
24 me.
25 Q. And in 1996, these non-susceptible smokers
are now
1235
1 age 15 to 20. You have 1,752 of them; is that
correct?
2 A. Could you please tell me the significance
of spaces
3 here?
4 Q. Just identifying that we lost some from
the
5 non-susceptible never smokers.
6 A. That's a proportional decrease you are
saying?
7 Q. Yes.
8 A. What you are saying, we have lost 26
percent or
9 something of that sort.
10 Q. Approximately; is that correct, doctor?
11 A. Or let's put it more appropriately, we
didn't follow
12 up with that many.
13 Q. That's correct. Now, doctor, I want to go
back to
14 your survey.
15 A. Let me, add something to that because I
think it's

16 relevant to what you are saying here. The
survey's a
17 representative sample. And it's weighted to the
population
18 of California. And there are two types of
weighting that
19 occurs with respect to that.
20 But one has to do with the ability
to respond.
21 Because we knew if we didn't respond, we were
able to
22 weigh that population. So, the sample was
representative
23 as best we can.

24 Q. Now, doctor, returning to the questions
that you
25 asked these returning non-susceptible never
smokers in

1236

1 1996, you reask them, if I understand the way
your study
2 went, you reasked them the same questions that
they were
3 asked in 1993; is that correct?

4 A. Well, there was a question changed because
we had a
5 group of consultants. But it goes back to the
way the
6 survey was done. The initial survey was
undertaken for the
7 California Department of Health Services.

8 And they were interested in cross
sectional
9 surveys, a shot across time. If we wanted to
do research,
10 which was unrelated to as they saw it to the
change or was
11 actually happening in the population at a given
point in
12 time, we were, they allowed us to go and get
extra money
13 for it in some way.

14 We went and did get extra money from
the Rhud
15 Johnson Foundation. But as a condition for
getting that
16 money, we were required to use some
consultants.

17 Q. Doctor, what I want to do is ask you what
questions
18 you asked these people in 1996.

19 A. So, we changed one of the questions, yes.

20 Q. Can we turn to that. You asked them 3
basic
21 questions, do you think in the future you might
experiment
22 with cigarettes. And they had four possible
responses.

23 I will probably try one; I will
probably not
24 try one; I don't think I will ever smoke a
cigarette; I

25 definitely will not smoke a cigarette.

1237

1 The second question is, if one of
your best
2 friends would offer you a cigarette, would you
smoke it?
3 And they had the same responses in 1993 that
they had
4 available to them.
5 And the third question is, at any
time during
6 the next year do you think you will smoke a
cigarette?
7 And they have the same responses available to
them; is
8 that correct, is that right?
9 A. Correct.
10 Q. Now, in your survey, if somebody who was a
11 non-susceptible never smoker in 1993 who
answered
12 definitely not to the question at any time
during the next
13 year, do you think you will smoke a cigarette?
If in 1996
14 they answered that question probably not, you
indicated
15 that they were on the road to becoming a smoker;
is that
16 correct?
17 A. We would label them as susceptible, yes.
And all our
18 evidence in other studies as well shows that
their chances
19 of becoming a smoker are twice as great as they
would have
20 been if they stated definitely not.
21 Q. So, if all that has changed in three
years, a
22 respondent in your survey for three years has
not smoked,
23 he hasn't taken a puff, he answered always the
question the
24 same way he did in 1993, but instead of saying
definitely
25 not at any time during the next year do you
think you will

1238

1 smoke a cigarette, he answers probably not, you
say he is
2 on the road to becoming a smoker?
3 A. I say he's no longer a committed never
smoker.
4 Q. And that is part of the process by which
your data
5 was analyzed for your article in 1998; is that
correct?
6 A. I'm not following your question too well.
7 Q. Well, this would mean that somebody over
in,
8 according to this, would mean that somebody over
the last

9 three years is now on his way to becoming a
smoker who in
10 1993 was a committed never smoker,
non-committed, never
11 smoked?
12 A. What you are saying is in 1996 I would
classify that
13 person as susceptible.
14 Q. Correct.
15 A. Right.
16 Q. If one of your best friends would offer
you a
17 cigarette, would you smoke it. If the person
now says
18 probably not, but answers all the questions for
the same
19 way and for three years has not even taken a
puff of a
20 cigarette, you are saying he is now on his way
to becoming
21 a smoker?
22 A. I say he is susceptible.
23 Q. And your study analyzes, you claim, the
effects of
24 advertising on the creation of susceptible
people from
25 non-susceptible people; do you follow?

1239

1 A. I don't agree. What I think my study
does, it looks
2 at the progress out of the committed never
smoker category.
3 It looks at anybody who moved up out of that
category.
4 It looks to see if they could be
susceptible.
5 I think 16 percent were susceptible, a much
higher portion
6 if they would have another cigarette, and those
who
7 already were already smoking a hundred
cigarettes by the
8 third period.
9 Q. Let me show you some of the data. In
1996, 50.3
10 percent remained non-susceptible, never smokers,
correct?
11 A little bit over half the returning
group
12 after three years remained non-susceptible
never smokers,
13 correct?
14 A. Correct. I think, I mean, it's
approximately right,
15 as best I can tell. Those were your blue items,
were they?
16 Q. That's right. You are following the color
pattern
17 now?
18 A. I'm trying, but I can't, it's very
difficult for me
19 to assist where you have, where you have got the

bright

20 blue portion of dots here. You seem to be
taking them out
21 at random.
22 Q. Now, with respect to those people who
answered the
23 survey they haven't smoked, but they answered
the survey
24 slightly differently with respect to definitely
not versus
25 probably not, 16.6 percent were susceptible
never smokers;

1240

1 is that correct according to you?
2 A. I think if we put the numbers down, we are
talking
3 1.2 million California adolescents remained as
committed
4 never smokers. And we are coming down here now
to about
5 400 thousand.
6 We're saying now something of that
order became
7 susceptible. So, I think that's about right.
I think
8 it's around that, maybe 300,000, I'm rounding a
bit here.
9 Q. You had 300 thousand respondents in this
survey,
10 doctor?
11 A. I have a representative sample, and a
representative
12 sample as it's sampling technology. I know it's
a debate
13 at the moment writing to the census. But the
issue is all
14 surveys, all studies of population use sampling
frames,
15 sampling technology to efficiently estimate what
is
16 happening.
17 And what is important is that you
have a
18 random, a random survey. And that you are able
to weight
19 it to the population to adjust for issues of
non-response
20 and which may be specific to some groups more
than others,
21 et cetera.
22 So, we do have a weighted sample.
Here we were
23 we able to use this sample to predict what
would happen to
24 the population. So, the numbers we have here
reflect the
25 order of 300 thousand adolescents in
California.

1241

1 Q. Now, let's continue with the results.
Now, some of

the prior 2 the returning participants in the survey over
had smoked 3 three years had taken one puff of a cigarette or
hundred; is that 4 as many as 99 cigarettes, but less than a
5 right?
hundred. 6 A. Well, they said they hadn't smoked a
7 Q. Okay.
8 A. But they had smoked at least a puff.
9 Q. But they had smoked at least a puff. And
those
10 people you called experimenters; is that
correct?
11 A. Correct.
12 Q. Now, in your survey results, if somebody
says that
13 they smoked a puff, or they smoked less than a
hundred
14 cigarettes, did you do any analysis to see when
that puff
15 was taken or when the 99 cigarettes were
consumed?
16 A. Well, I don't think we had the intimation
to do that?
17 Q. So, over the three year period that could
have been a
18 puff the day after they were interviewed in
1993, and three
19 years later you called them experimenters; is
that correct?
20 A. That could have been. It is feasible that
that is,
21 would be one way to look at it.
22 Q. Okay. And there was no questioning of
those
23 responders to find out exactly when the smoking
behavior
24 occurred in connection with the timing of this
survey in
25 1996?

1242
significant one,
year old 1 A. Well, the problem with recall is a
yesterday. So, 2 especially for 12 or 13 year olds. And my 13
things 3 can't remember what she had for breakfast
4 we are worried about going for a long history of
5 with young children, so we --
6 Q. So, what you are saying is the responses
of 12 and 13 7 year olds are unreliable?
8 A. I didn't say that, I don't think.
9 Q. Well, in any event, for the people who
took one puff
10 but less than 99 cigarettes, 29.5 percent; is
that correct?
11 A. I believe so.
12 Q. Okay. Now --

13 A. We can easily do this by putting table one
out of the
14 ad chart. They have these broken down,
sociodemographics
15 by age, ethnicity, and education, performance.
16 Q. All right, doctor, at the end of the day
3.6 percent
17 of the respondents indicated that during the
last three
18 years they had smoked 5 packs of cigarettes or
more; is
19 that correct?
20 A. Yes.
21 Q. Okay. And again, there is no indication
and no
22 follow up question as to when that smoking
behavior
23 occurred in relation to their response in 1996,
correct?
24 A. Correct.
25 Q. You could have asked -- the survey could
have asked

1243
1 are you smoking on a daily basis today? That
wasn't the
2 question that was asked of them, was it?
3 A. No, I didn't ask these.
4 THE COURT: Let him finish the
response.
5 Q. I'm sorry, your Honor.
6 A. The issue, there is a lot of questions you
could ask.
7 And, as I've pointed out, the hundred cigarettes
is a
8 question that is a very good marker of
addiction.
9 And we went through that, I think,
in my
10 testimony relating to the standard criteria for
addiction.
11 And that's why we are using it.
12 We are not using daily smoking. We
are not
13 using daily smoking of a half a pack of
cigarettes a day,
14 but we are using the smoking of a hundred
cigarettes.
15 Q. And it's possible someone who was 17 at
the time they
16 were interviewed in 1993 went off to college and
during
17 exam week decided that they would experiment
with
18 cigarettes, calculated that they had smoked a
hundred, and
19 decided never to smoke again. And you
categorized them as
20 smokers, correct?
21 A. Yes, I did. But all the doubt about age
is in table
22 one. And if you look at that, I think you will
see this is

olds who
hundred
23 not all 17 year olds who later became 20 year
24 experimented or actually went on to smoke a
25 cigarettes.

1244

1 Q. So, out of 1752 non-susceptible never
smokers, at the
2 end of three years 63 indicated that they had
smoked 5
3 packs or more at some point over the last three
years; is
4 that correct?
5 A. We are saying about 30 thousand people,
yes, yes;
6 that's correct. That's the population estimate.
7 Q. Now, it's based on 63 people indicating
that they
8 smoked 5 packs or more over the last three
years. At some
9 point you come to the conclusion that tobacco
advertising
10 is causing one-third of all smoking in this
country?
11 A. I beg your pardon? I don't understand how
you get to
12 that conclusion at all. If you look at my
testimony, we
13 are looking at tobacco advertising relating to
14 experimentation.
15 We didn't say looking at addiction.
We said
16 what level of experimentation is being caused
by tobacco
17 advertising promotion. And as you very
carefully pointed
18 out, that is much more.
19 I was surprised that even in
California with
20 very strong campaigns, one-third of those who
were
21 committed never smokers, and some of them were
17 year
22 olds, I agree, one-third of them had
experimented within
23 the next three years. And many of them had
experimented
24 even before that.
25 And so we took only the committed
never

1245

1 smokers. Anyone who had experimented or was
even
2 susceptible at base line we excluded from this
analysis.
3 And still one-third of them experimented. That
is an
4 enormously high number.
5 Q. Now, doctor, you know that the 1994
Surgeon General
6 report details in it, and the jury heard some of

this
various factors
familiar
smoking
education,
background,
You know
what you
who are
cigarettes a
month. I think
you. What I'm
for smoking
Surgeon General's
family
parent

7 yesterday during another cross examination,
8 that are factors in smoking initiation. Are you
9 with the 1994 Surgeon General report?
10 A. Yes, I am.
11 Q. And you know some of the risk factors for
12 include socioeconomic status, level of family
13 level of academic achievement, ethnic
14 propensity for taking risk, factors like that.
15 that, don't you?
16 A. You are asking me whether I think this is
17 are asking me. Whether if we look at the people
18 current smokers and are smoking at least 30
19 day, 30 cigarettes were smoked in the last
20 it is.
21 Q. Dr. Pierce, that's not what I'm asking
22 asking you, are you aware that the risk factors
23 initiation that are described in the 1994
24 report include socioeconomic status, level of
25 education, level of academic achievement, single

1246
risk, parental
parental
the 1994
advertising too.
the 63 who
years they had
analyze your
smoked?
Lerman, that I
non-susceptible
baseline were

1 household, ethnic background, propensity for
2 smoking, sibling smoking, friend smoking,
3 attitudes -- are those things all discussed in
4 Surgeon General report?
5 A. Yes, I think they have a chapter on
6 Q. Now, of the respondents in your survey,
7 came back and said that over the last three
8 smoked at least 5 packs of cigarettes, did you
9 data to see how many of them had friends who
10 A. I think I've said to you before, Mr.
11 did not analyze the data of which
12 smokers which committed never smokers at
13 addicted at follow up.
14 What I did, I analyzed those who had
15 progressed. There is a huge difference. I

think in my
16 testimony I pointed out to you that the time
period for
17 moving from experimentation to addiction could
be as long
18 as five years.
19 And if it's as long as five years,
actually
20 it's so surprising that three percent of that
group who
21 were absolutely committed never smokers at the
front end
22 were and smoked a hundred by follow up.
23 And in the '98 paper I didn't do
that. In
24 other papers I have looked at, one of the
variables that
25 are associated with moving rapidly from
experimentation to

1247
1 addiction, as we are calling it here, the
markers of
2 addiction -- and there is no question that
family smoking
3 is the most important variable -- and the
question is, is
4 it because they are exposed to the parents who
smoked, or
5 is it because there was some genetic
acceptability, or was
6 it the way they physiologically handled stress.
7 All these issues are very hot issues
being
8 studied at the moment by the American Cancer
Institute of
9 what makes -- the question is why do so many
people,
10 approximately between 30 and 50 percent, become
addicted
11 when they experiment and others don't?
12 And that proportion seems to stay
the same no
13 matter how many people experiment. So, it
suggests that
14 experimentation is the controlling factor on
prevalence.
15 And there is something else and some constant
factors that
16 if someone experiments they might become a
smoker.
17 That's a very hot line of research
at the
18 moment. Certainly, the strongest variable we
have for
19 that is parental smoking.
20 Q. Doctor, did 97 percent or more of those
who came back
21 saying that they smoked 5 packs or more over the
last three
22 years also answer positively that they had
friends who
23 smoked, yes or no?

look at 24 A. I think, Mr. Lerman, I told you we didn't
25 that. You are talking about 97 percent of these
people,

1248

1 these 63 people; is that what you are saying?
2 I don't know why I would look at
that variable 3 in that way if I wanted to look at who became
addicted. I 4 start with people who had experimented, because
you have 5 only got a three year period, which is much,
much shorter 6 than the period that it looks like people
become addicted.

7 Therefore, you start halfway up the
scale. You 8 start with experimentation and look at who
became addicted 9 to have a reasonable sample. You wanted to
look at the 10 front of it. You look at what we did, take the
fully 11 committed never smoker and see who got to the
experimental 12 level, and so forth.

13 So, you break up the process of
becoming a 14 smoker into either looking at the front end or
looking at 15 the back end. You wouldn't just look for those
who very 16 rapidly started smoking during the time period.

17 Q. Let me show you what was marked AIW
003486. Do you 18 recognize this article called Parental
Influences Predict 19 Adolescent Smoking in the United States, 1989 to
1993?

20 A. Yes, I do.
21 Q. Are you one of the authors of that
article?

22 A. Yes, I am.
23 Q. And was this published in June of 1998?
24 A. I think it is the Journal of Adolescent
Health.

25 Q. Was it published in June of 1988?

1249

1 A. I believe so; I'm not sure.
2 Q. Was that just a -- what we spent a half
hour going 3 through was published?
4 A. Yes. If you are asking me when we
submitted, we 5 probably submitted it a good a year ahead of the
other one. 6 Different journals have longer time periods in
terms of 7 publications than others.
8 And some papers -- I have one at the

moment

9 that's been three years being reviewed, which
is, I find,
10 extremely long time.
11 Q. Doctor, can I direct your attention to the
paragraph
12 that's been highlighted in this article that you
published
13 in June of 1998 less than a year ago, it says
the single
14 most important factor promoting the initiation
and
15 escalation of substance abuse in adolescents is
whether
16 parents, older siblings, and friends engage in
the
17 behavior.

18 Exposure to smokers in the social
network is a
19 strong and consistent predictor of smoking
initiation.
20 Adolescents whose friends or family members
smoke, drink,
21 or use drugs are significantly more likely to
become
22 substantial users themselves than are those
whose family
23 members or friends abstain.

24 Is that your argument, sir?
25 A. Correct, that's the introduction of the
article. And

1250

1 summarizing the evidence which was in the
Surgeon General's
2 report, that is a reasonable summary of the
evidence.

3 Q. That was published after your 1998
February article
4 that we have just gone through?

5 A. What is the significance of that, sir? I
don't
6 understand it. I told you it was written well
before, but
7 the issue in terms of that, I think --

8 Q. Excuse me, doctor?
9 THE COURT: Wait until there is a
question. Do
10 you have anything else?

11 MR. LERMAN: I'm just looking,
judge. Your
12 Honor, if you give me 30 seconds, I might be
done.

13 MR. LERMAN: I have nothing further,
your
14 Honor.

15 - - -

16 REDIRECT EXAMINATION

17 BY MR. CRANDALL:
18 Q. Briefly, your Honor. Dr. Pierce, just
picking up
19 where Mr. Lerman left off, that 1998 article
that dealt

influence 20 with advertising impacts, did it control for the
just pulled up 21 of family and peer pressures that Mr. Lerman
22 on the screen?
23 A. Absolutely, it was a multi varied analysis
where we 24 controlled for all the major sociodemographics,
age, 25 education, race, ethnicity, and we also
controlled for the

1251

1 level of family smoking and the level of peer
smoking.
2 Q. So, you don't dispute and agree with the
fact that 3 parental influence and family pressure is a
factor in 4 smoking, right?
5 A. Not at all. I think it is an important
factor.
6 Q. What you did in the breakthrough, you did
in 1998, 7 was to control for it and to show taking it into
account, 8 you have an advertising impact; is that right?
9 A. That's right.
10 Q. Now, there was a series of disappearing
dots over 11 here on the screen where Mr. Lerman went through
and had 12 them go away, I guess, to show that the sample
size which 13 you were operating was relatively small.
14 Does that matter in the terms of the
analysis 15 that you did as a matter of statistics and a
matter of 16 sampling?
17 A. No.
18 Q. Tell the jury why not?
19 A. Well, the issue, the issue, as we started
with 1752 20 people, and the question was how many of those
progressed 21 toward smoking. And half of them did. And
that's what we 22 looked at, what was the predictor of that. It
didn't 23 matter how many had made it to a hundred
cigarettes, as I 24 said, we could have actually taken it down to
one person 25 who was probably smoking a pack a day at that
time.

1252

1 That was irrelevant. The question
was who 2 moved out of that committed never smoker
category and what 3 were the predictors of it? And it was tobacco

advertising
4 and promotion.
5 Q. And finally, Dr. Pierce, I have back if
front of you
6 PDM 109. Do you remember Mr. Lerman's question
about the
7 opposite of Joe Camel campaign, and asking you
questions
8 about the period between 1985 and 1989?
9 A. Yes, I do.
10 Q. Tell the jury what was happening in terms
of the Joe
11 Camel campaign as far as you know during that
time?
12 A. Well, what I know is that in 1995,
remember this big
13 point here, the French Camel material was
brought across.
14 Joe Camel was originally -- started in France as
the French
15 Camel. And the French actually withdrew it
because they
16 were sued. The company was sued for marketing
to kids, as
17 I understand it.
18 And the issue here was, they
distributed a lot
19 of things.
20 MR. LERMAN: Your Honor, I, move to
strike that
21 last.
22 THE COURT: Sustained. Disregard
that comment
23 about what happened in the French legal system.
24 A. The issue was in 1985 there were, there
was a lot of
25 T-shirts distributed. And nothing really
happened until we

1253

1 have the launching of their advertising
campaign, which was
2 I think in 1987, which was that 75 years
smoking.
3 And that I think there is '87 is
around there.
4 And nothing much happened until the launching
of their
5 Camel cash program. And, as you know, Joe
Camel has been
6 retired. And what happened in 1991 also was
the
7 publication of our first data showing the
effectiveness of
8 Joe Camel.
9 When that happened, Patrick, the
lawyer here,
10 actually sued as part of the Magini case for --
11 MR. LERMAN: Your Honor.
12 THE WITNESS: -- for the companies
and.
13 THE COURT: Sustained. Disregard
the last

14 portion.
15 THE WITNESS: Sorry.
16 Q. Well, Dr. Pierce, so that in the time
frame 1989,
17 there was what going on in terms of distribution
of
18 promotional materials of Joe Camel?
19 A. There was no Camel cash items or any sort
of that
20 being distributed. That started in 1991.
21 MR. CRANDALL: That's all I have,
your Honor.
22 THE COURT: Thank you, doctor.
23 Wait just a second, and one of the
jurors has
24 got a question. Would the attorneys come
forward.
25 (The following discussion was
conducted at the

1254
1 side bar between court and counsel, out of the
hearing of
2 the jurors, as follows:)
3 THE COURT: The question reads: The
prevalence
4 of heroin, marijuana, LSD, et cetera, among
American users
5 has constantly fluctuated from year to year.
This happens
6 without advertising. How are cigarettes
different from
7 this phenomenon?
8 So, I'll let you ask a follow up.
I'll ask him
9 the question. It has some relevance, and you
can ask
10 follow up on just that limited question.
11 (The following proceedings were
conducted in
12 open court.)
13 THE COURT: The question reads:
"The
14 prevalence of heroin, marijuana, LSD, et
cetera, among
15 American users has constantly fluctuated from
year to
16 year. This happens without advertising. How
are
17 cigarettes different from this phenomenon?"
18 So, I'll let you ask a follow up.
I'll ask him
19 the question. It has some relevance, and you
can ask
20 follow up on just that limited question.
21 (The following proceedings were
conducted in
22 open court.)
23 THE COURT: Doctor, the prevalence
of heroin,
24 marijuana, LSD, et cetera, among American youth
is
25 constantly fluctuating from year to year. This

happens

1255

1 without advertising. How are cigarettes
different from 2 this phenomenon?
3 First, I think that's two questions.
4 Is the prevalence of heroin,
marijuana, LSD, 5 etcetera fluctuating? And if so, how does that
happen 6 without advertising?
7 THE WITNESS: That's an interesting
question. 8 The marijuana which we tend to separate into
two groups; 9 marijuana and other illicit drugs, because of
the size of 10 the people doing it.
11 And the curve is not that
dissimilar. I mean, 12 the data set for this data was taken from, what
was used 13 to be the -- what was called the NIDO -- any
way, the drug 14 abuse group of the Federal Government who do a
household 15 survey. It was their survey.
16 And they actually question other
drugs, and 17 they also plotted that curve for marijuana and
other 18 drugs. And what's interesting is there is a
lag time of 19 about a year. The curve is basically similar.
And I 20 don't think that is sufficient to say that
cigarettes are 21 a gateway drug, which I know some people are
saying. 22 And so consequently things that
influence 23 people to start smoking may also influence them
to 24 undertake other behaviors. But certainly there
is a 25 correlation. And there is a lag period. And
the smoking

1256

1 comes first. The trends do tend to map each
other. 2 THE COURT: Do you have any follow
up 3 questions?
4 MR. CRANDALL: Not on behalf of the
plaintiff. 5 THE COURT: Do you have any?
6 MR. LERMAN: No.
7 THE COURT: Thank you, doctor.
Would the 8 plaintiff call your next witness? Do you want
to make any

9 interim arguments on behalf of the plaintiff?
 10 MR. COUGHLIN: Your Honor, we are
 going to do
 11 some depositions.
 12 THE COURT: Do you wish to make any
 interim
 13 argument before we go to that?
 14 MR. CRANDALL: Ladies and gentlemen,
 the
 15 testimony from Dr. Pierce, who is a -- who's
 not
 16 affiliated with any side here, is a gentleman
 who's
 17 devoted his entire career to assessing the
 impact of
 18 tobacco advertising, just about started out the
 Center for
 19 Disease Control, proves here something that
 probably each
 20 and every one of you have thought makes sense
 from a
 21 common sense point of view; that is,
 advertising matters.
 22 The data that Dr. Pierce was relying
 on to
 23 reach his conclusions in front of you was
 completely
 24 exclusive, did not contain any internal company
 documents
 25 that you are now seeing in this trial that have
 been
 1257
 1 referred to.
 2 He didn't have the benefit of those
 documents
 3 when he was doing his research. And he didn't
 get inside
 4 to look at the intent of tobacco companies in
 terms of
 5 what they were doing. He just took the data on
 smoking
 6 behavior as an epidemiologist, ran it, used
 acceptable
 7 scientific techniques, and came to the
 conclusion that
 8 indeed advertising is having an influence on
 the uptake of
 9 smoking, not only of adults, but significantly
 on under
 10 aged smokers.
 11 And he also pointed out which is
 what is very
 12 interesting, which is since the 1960's we have
 had this
 13 drop off in adult smoking. The only place for
 replacement
 14 smokers is from the under age market.
 15 Now, you have heard that evidence,
 and you
 16 will, throughout this trial, from other
 sources, from
 17 industry documents, from the internal documents

that were
showed you
there is a
campaigns and
smoking. And
Pierce were,
is not
Center for
1258
California in
this case
stands alone,
that he can
Alone. Not
not in
yesterday
articles that
Not only does
one-third, an
the result
and we'll
that have
which there
bans go in
demand.
His study
go through
relying on
credible. It is

18 never before published what Dr. Pierce just
19 today was that forget about those documents.
20 There was a serious impact, and
21 serious impact particularly in the Joe Camel
22 these other campaigns on the uptake of youth
23 that the defendants' efforts to go after Dr.
24 are really just nitpicking on a scientist who
25 aligned with either side but came from the
Disease Control and the University of the
San Diego and published his work long before
even started.
THE COURT: Thank you, Mr. Lerman.
MR. LERMAN: Thank you, your Honor.
Ladies and gentlemen, Dr. Pierce
alone as the only social scientist who says
prove advertising causes demand to increase.
the Surgeon General, not in 1979, not in 1989,
1994, not today. Even Dr. Arnett who testified
said that he would not use the word cause.
And we looked at some peer review
wouldn't get published with the word cause.
Dr. Pierce say there is cause, he says that
astounding number, one-third of all smoking is
of advertising.
Yet we know, ladies and gentlemen,
learn that there are countries in the world
banned advertising, never had advertising, in
is substantial smoking; that when television ad
place in Australia, there is no effect on
What Dr. Pierce says stands alone.
is an aberration. And the reason I wanted to
it with you was so that you could see what he's
when he makes these statements. It's not

1259

1 not going to be the evidence in this case.
2 THE COURT: Thank you.
3 Who would the plaintiffs at this
time call as
4 your next witness.
5 MR. COUGHLIN: We would call Gerald
Long.
6 THE COURT: How are you going to do
this? Do
7 you have a videotape?
8 MR. COUGHLIN: We have a videotape
keyed up to
9 go.
10 THE COURT: It's ready to go?
11 MR. COUGHLIN: Yes.
12 THE COURT: Ladies and gentlemen,
the testimony
13 you are going to hear now is testimony by way
of a
14 deposition. I had indicated to you before
deposition is
15 testimony taken under oath before a trial and
then either
16 videotaped or typed for either playback or read
back at
17 trial.
18 You can receive, and you are to
receive and
19 consider this testimony the same as if the
witness were
20 here live. Okay.
21 MR. BIERSTEKER: Your Honor, may we
approach
22 for just a moment.
23 (The following discussion was
conducted at the
24 side bar between court and counsel, out of the
hearing of
25 the jurors, as follows:)

1260

1 (The following discussion was
conducted at the
2 side bar between court and counsel, out of the
hearing of
3 the jurors, as follows:)
4 MR. BIERSTEKER: We had written to
plaintiffs
5 because they had a tape of just their
designations, and we
6 said we would prepare a tape that had those
designations.
7 Because it doesn't have a split
screen, and you
8 can't see the documents, they want to run just
their tape
9 with their designations on it. The problem is,
I don't
10 have a separate tape with just the Reynolds
deposition on
11 it. If they want to run a different

deposition, read the
12 deposition, but I don't have a tape to play
when they are
13 finished with their designations because we
agreed we
14 would play theirs and ours.
15 MR. COUGHLIN: Your Honor, we made a
split
16 screen tape. They come up and said, hey, we'll
put it
17 together for you. And they don't have it. And
then I
18 said fine. And then I find out they didn't put
the
19 documents on it.
20 THE COURT: Basically, your
examination is
21 after the plaintiff is finished.
22 MR. LONG: I have a copy here, if
you'd like to
23 see it.
24 THE COURT: How long is it?
25 MR. COUGHLIN: Some tapes are 7 to
10 minutes.

1261
1 MR. BIERSTEKER: This is all of the
Reynolds
2 ones. It's true for the Philip Morris ones
too.
3 MR. COUGHLIN: Nobody told me --
4 MR. BIERSTEKER: I think it would be
very
5 unfair for them to play the tape and me have to
read
6 things. It was an honest mistake.
7 THE COURT: I think the only thing I
can do is
8 let them play the tape, and then you would have
your
9 right, in your part of the case, you would have
a couple
10 days to excerpt it, because it would be your
witness
11 technically.
12 You would have no right to examine
at this time
13 your own witnesses.
14 MR. BIERSTEKER: We would have a
right by rule
15 of completeness, some of this is stuff that
immediately
16 precedes and follows the stuff they are
playing. And we
17 and we are deprived of that right here.
18 THE COURT: No, because you can
bring it in
19 your own case. I'm not suggesting doing it
this way, but
20 I don't know how else to do it. If they
believe the
21 exhibits themselves are important for the
presentation and

22 split screen, I don't know how else to do it,
unless you
23 have some other witnesses you can stick in now.
24 MR. COUGHLIN: We don't.
25 MR. BIERSTEKER: We can get another
deposition

1262
1 and we'll fix it overnight.
2 MR. COUGHLIN: This is the way we
did our
3 depositions.
4 THE COURT: Do you have any others
that don't
5 have this problem?
6 MR. COUGHLIN: I didn't think it was
a problem.
7 MR. BIERSTEKER: Look, it was honest
--
8 THE COURT: Do you have any others
that you
9 don't have this problem with?
10 MR. COUGHLIN: No. Listen, I just
heard about
11 this, that he didn't know that. I'm surprised
that he
12 didn't know that, okay.
13 MR. BIERSTEKER: Okay.
14 THE COURT: Let's just answer my
question, do
15 you have any other --
16 MR. COUGHLIN: No, no. And I don't
want to
17 prejudice him if that's what he thinks. That
wasn't my
18 intent. I just intended to do it our way. I
thought they
19 were going to do it their way. If they could
split screen
20 it first, I thought that was great.
21 THE COURT: What's your proposal?
22 MR. COUGHLIN: My proposal is that I
play the
23 tapes. I understand what he's saying. I'm
sensitive to
24 it.
25 THE COURT: You don't have any --
your operator

1263
1 can't go through and find the parts they are
talking
2 about?
3 MR. COUGHLIN: We cannot do that
now. What we
4 would have to do, we'd have to -- we would have
to pull
5 these tapes. We could probably do it all by
Monday and go
6 into the next week, you know, working together
on it.
7 MR. BIERSTEKER: That's fine or --
8 THE COURT: You don't have anything

to fill the
9 time, though? Could you get somebody else?
10 MR. COUGHLIN: I can't. I thought I
would
11 maybe play these tapes for an hour and a half,
just so
12 we'd split up the tapes. We have witnesses all
day
13 tomorrow. I have an extra witness tomorrow.
14 MR. BIERSTEKER: Can I make a
suggestion? We
15 might play the tape without the split screen
and without
16 the documents. I don't know if they could put
the exhibit
17 on the monitor while they are playing the
monitors.
18 MR. COUGHLIN: If I'm quick --
19 MR. BIERSTEKER: That would solve
the problem
20 all the way around.
21 THE COURT: Why don't you try.
22 MR. COUGHLIN: Try to play the tape
and put the
23 document on.
24 MR. BIERSTEKER: I'm sorry, Patrick.
I really
25 am.

1264
1 (The following proceedings were
conducted in
2 open court.)
3 THE COURT: If you want to get up
and move
4 around a little bit, we are just trying to get
some
5 depositions cued up. You can go back to the
jury room if
6 you want.
7 Why don't you try to get the
documents as best
8 you can in terms of the order.
9 MR. COUGHLIN: I'll see what I can
do.
10 MR. BIERSTEKER: Thank you, your
Honor.
11 (The jurors were returned to the
courtroom and
12 the following proceedings were conducted in
open court:)
13 THE COURT: If you will please be
seated.
14 The plaintiff calls who as their
next witness?
15 MR. COUGHLIN: Judge, Gerald Long.
16 THE COURT: Mr. Long is a witness
identified by
17 the defendants. His testimony is going to be
presented to
18 you by way of deposition. You are to receive
and consider
19 this the same as if the witness were testifying

live.

20 Now, the way this is going to be
done, it's
21 going to be done in two formats. As to part of
the
22 examination, it will be done by showing you a
videotape of
23 Mr. Long's deposition.
24 There may be some exhibits as part
of that. As
25 to other parts of the deposition, it will be
read to you

1265

1 with Mr. Bernick playing the part of Mr. Long.
So, he'll
2 respond, read the responses of Mr. Long in
regard to
3 questions given, in response to counsel for
RJR.
4 I believe the first excerpt we are
going to
5 deal with is that of a portion that will be
read to you,
6 and I call upon Mr. Jones to begin.
7 MR. COUGHLIN: And, your Honor, just
for
8 clarification, I'm the person asking the
questions and
9 he's going to be asking them today. But I'm
the person
10 that took the deposition of Mr. Long in a
different state.
11 That's what you will see. They are going to do
their
12 first part of their designation.
13 THE COURT: I'm sure they will
understand it.
14 MR. BIERSTEKER: We apologize for
this
15 procedure. There was a technical problem in
getting the
16 tape together. That's why we are reading it
in. I'm
17 Peter Biersteker.

18 DEPOSITION OF GERALD LONG READ AND PLAYED AS
FOLLOWS:

19 BY MR. BIERSTEKER:
20 Q. Could you, please, tell us when you
started with RJR?
21 A. Yes. I joined RJR in March of 1969 in the
RJR Foods
22 Company.
23 Q. And what was your position then?
24 A. The title was brand director.
25 Q. And you say it was the foods company.
What was the

1266

1 name of the division or --
2 A. The name of the division was RJR Foods
Company.
3 Q. And what were your duties in that?

4 A. I was the Marketing Director.
5 Q. And how long did you stay in that
position?
6 A. In that specific position for -- until
about 1972, I
7 believe it was.
8 Q. And where did you go from there?
9 A. I was promoted at that time to Vice
President of
10 Marketing and Marketing Services.
11 Q. For the Foods Division?
12 A. For the Foods Division.
13 Q. And what did the Food Division have under
it? What
14 kind of foods?
15 A. It was food products such as Hawaiiam
Punch, Chun
16 King Foods, Mighty Fine Desserts, baking
powders, a lot of
17 different miscellaneous foods and desserts,
Patio Mexican
18 Foods and so forth.
19 Q. After 1972 where did you go? How long did
you stay
20 in that position?
21 A. I stayed in that position until
approximately 1975, I
22 believe it was. And I had been promoted, I
believe,
23 somewhere along 1972 as the Vice President of --
1972 and
24 1973 to Vice President of Marketing of the Food
Company and
25 stayed in that position until about 1975.

1267

1 Q. And after 1975 where did you go?
2 A. In 1975 I was moved into the new R. J.
Reynolds
3 Tobacco International Company, and then I became
Vice
4 President of Marketing and Sales of that
division.
5 Q. And that was RJR International?
6 A. RJR International.
7 Q. Was that separate from RJR Tobacco?
8 A. Yes. It was completely and totally
autonomous.

9 MR. BIERSTEKER: Skipping now to
page 7 of the
10 deposition, line 18.

11 Q. And how long did you stay in that
position?
12 A. I stayed in that position until
approximately the
13 fall of 1979.
14 Q. And what position did you take over then?
15 A. At that time I was promoted in the fall of
1979 and
16 moved from the Tobacco International company to
what was
17 called R.J. Reynolds Tobacco Company USA.
18 Q. And when you said "promoted", why was it a

promotion?

19 A. Because I was promoted to Executive Vice
President of
20 Marketing and Sales of the U.S. operation.
21 Q. Okay, and how long did you hold that
position?
22 A. Until sometime in the middle or fall of
1981. I
23 don't know exactly what date. And I was
promoted to
24 President of the U.S. operation.
25 Q. And how long did you hold that position?

1268

1 A. Until sometime in 1984. At that time I
was made, had
2 the title of Chairman of Tobacco USA.
3 Q. Okay. And from '84 how long did you hold
that
4 position?
5 A. Until approximately July of 1988 or
sometime in 1988.
6 I don't remember the exact time. And at that
time I left
7 RJR.
8 Q. And where did you go?
9 A. I retired.
10 Q. While you were running the company, did
you accept an
11 obligation to aid and assist into all phases of
research of
12 tobacco and health?
13 There was an objection to the form.
14 Q. Go ahead. You can answer.
15 A. The answer to that question would be that
I felt that
16 we accepted the responsibility in line with what
was the
17 legal requirements that the company followed,
and we
18 followed every legal requirement that the
company presented
19 to us through our legal department and then, in
turn, down
20 to my operation -- my part of the operation.
21 (The taped deposition was played as
follows:)
22 A. While you were the head of RJRT, did RJRT
undertake
23 research into health and smoking?
24 A. I could not truthfully say that I can
recall that in
25 any way whatsoever.

1269

1 Q. You know what the Council for Tobacco
Research is; is
2 that right?
3 A. I know vaguely about it because I have
never been
4 involved with it, never attended a meeting or
ever had
5 anything to do with it.

biological 6 Q. Okay. This memo talks about "in-house
terminated, 7 testing in the smoking and health area has been
needed will 8 and any further biological testing that may be
that 9 be farmed out." Did you have any information on
10 subject?

11 A. First of all, I've never seen this
document before,
12 and I do not know when it was written.

13 Q. I think it was written about 1970, but it
doesn't
14 have a date on it.

15 A. Okay. Then, no, I have never seen the
document, nor
16 did I receive any information from anybody at
that time.

17 Q. And nobody talked to you about the closing
of that
18 facility in 1970?

19 A. No, definitely not.

20 Q. What was your understanding of why the CTR
was
21 formed, Council of Tobacco Research?

22 A. I had never been presented any information
about CTR,
23 about its formation or operation, and during my
tenure I
24 had really nothing to do with it.

25 Q. Did you have anything to do with the
Tobacco

1270

1 Institute, TI?

2 A. Yes, I did.

3 Q. What was your role with that?

4 A. I became a member of the Tobacco Institute

--

5 THE COURT: I'm not sure which page
you are on.

6 MR. BIERSTEKER: Apparently some of
the
7 designations were skipped on plaintiff's tape.

I expected
8 to find some additional excerpts too. I did
find the
9 place; it is 26.

10 THE COURT: Can you back cue that to
the last
11 stop. And if you have some questions in that
interim

12 area, you want to ask, but --

13 MR. BIERSTEKER: I was scanning as
it went
14 along.

15 THE COURT: Do you wish to ask the
questions on
16 page 23?

17 MR. BIERSTEKER: Yes, your Honor, I
will. I'm
18 sorry.

19 THE COURT: Okay. And also if you
turn the
20 volume down just a bit.
21 BY MR. BIERSTEKER:
22 Q. Did you ever talk to any of the RJRT
scientists while
23 you were at RJRT?
24 A. I had talked to scientists over some
period of time,
25 yes.

1271
1 Q. Who were the scientists that you talked to
while you
2 were there?
3 A. That's going back almost 25 years ago, and
I can't
4 remember that.
5 Q. Well, when you were a head of RJRT from
'84, what, to
6 '88?
7 A. Yes.
8 Q. -- who was the chief scientist?
9 A. The person who was in charge of the R and
D
10 department at that time was Dr. Robert DiMarco.
11 Q. Did Dr. DiMarco ever talk to you about
what type of
12 research RJRT was undertaking?
13 A. He did not specifically cover it, to my
knowledge.
14 Q. What type of discussions did you have with
him? What
15 topics?
16 A. It was basically --
17 MR. BIERSTEKER: There was an
objection. Go
18 ahead.
19 A. I'm sorry. It was basically
administrative
20 discussions regarding the size of the
department, the
21 personnel, the organizational structure, the
budgets and of
22 that nature.
23 MR. BIERSTEKER: I'm sorry. Now you
want to
24 commence the tape?
25 (The taped deposition was played as
follows:)

1272
1 Q. This memo talks about "in-house biological
testing in
2 the smoking and health area has been terminated,
and any
3 further biological testing that may be needed
will be
4 farmed out." Did you have any information on
that subject?
5 A. First of all, I have never seen this
document before,
6 and I do not know when it was written.

7 Q. I think it was written about 1970, but it
 doesn't
 8 have a date on it.
 9 A. Okay. Then, no, I have never seen the
 document or
 10 did I have any information from anybody at that
 time.
 11 Q. And nobody talked to you about closure of
 the
 12 facility in 1970?
 13 A. No, definitely not.
 14 Q. What was your understanding of why the CTR
 was
 15 formed, Council for Tobacco Research?
 16 A. I had never been presented any information
 about CTR,
 17 about its formation or operation, and during my
 tenure I
 18 had really nothing to do with them whatsoever.
 19 Q. Did you have anything to do with the
 Tobacco
 20 Institute, TI?
 21 A. Yes, I did.
 22 Q. What was your role with them?
 23 A. I became a member of the Tobacco Institute
 board, I
 24 believe, sometime around 1983, 1984. I'm not
 exactly sure
 25 what year, but it was around that period of
 time, and

 1273
 1 stayed as a member of that board, I believe,
 until 1988
 2 when I left -- retired from RJR.
 3 Q. When you became a member of the board, did
 you find
 4 out the history and why TI was formed?
 5 A. No. I was never given any -- I cannot
 recall any
 6 information on that background at all. I was
 just asked to
 7 join that board.
 8 Q. Did you have an understanding that TI was
 an offshoot
 9 of the predecessor to CTR?
 10 A. No. I have never -- this is the first
 time I've
 11 heard that statement.
 12 Q. You had no understanding of that?
 13 A. No, I did not.
 14 Q. Do you have an understanding what the TI
 -- the
 15 Tobacco Institute Research Committee -- the
 TIRC,
 16 predecessor organization to CTR was?
 17 A. No, I did not.
 18 Q. Here it talks about that, "throughout the
 domestic
 19 industry, two gentlemen's agreements were
 operative in the
 20 early days: Any company discovering an
 innovation

21 permitting the fabrication of an essentially
safe cigarette
22 would share the discovery with others in the
industry, and
23 no domestic company would use intact animals
in-house in
24 biomedical research." Did you know about that
agreement?
25 A. No, I did not know anything about such an
agreement.

1274

1 Q. Do you know how Dr. Rodgman in the
Research
2 Department would know about an agreement with
the industry
3 and yet the head, the CEO of RJRT would not?
4 THE COURT: Overruled.
5 A. I can't really explain that. All I can
state is that
6 I did not have any knowledge of this.
7 THE COURT: All right. Back to it ,
8 Mr. Biersteker.
9 BY MR. BIERSTEKER:
10 Q. Question, this is on page 32. What did
the company
11 do along those lines? What actions? I don't
want the
12 discussions now. I just want to know what
actions the
13 company took.
14 A. First of all, we abided by the laws and
regulations
15 that were put forth by the Federal Government.
We did
16 that, number one. Number two, of our own
accord, we
17 reduced the tar and nicotine content of our
cigarettes
18 because we felt this was in the best interests
of the
19 consumer.
20 And I'm going by memory now, but I
think over
21 a period of years that I was with the company
that we
22 reduced the tar and nicotine content of our
products by
23 perhaps as much as 50 percent or more. I can't
remember
24 at this time because that would have varied by
brand, but
25 we worked on that, and that was a continuous
project.

1275

1 In addition to that I participated
in the
2 development of -- the initial development of
the product
3 that subsequently became Premier. That was
somewhere, I
4 believe, in about 1983 because, again, we

thought this was

5 in the best interest of the consumer that we
would develop
6 a product that would be -- we'll call it "smoke
free",
7 that would have very low tar and nicotine
content, and we
8 thought this would be a product we could offer
to the
9 consumer as an interest in smoking that would
be a product
10 that would be of greater interest to them from
a marketing
11 point of view.

12 MR. BIERSTEKER: And, your Honor,
maybe before
13 they cue up the video tape, on page 39 the next
14 designation by plaintiffs. The question
starting line 22,

15 I have a hearsay objection to.
16 THE COURT: I'll overrule the
objection.

17 MR. BIERSTEKER: I'm sorry.

18 THE COURT: I overruled the
objection.

19 MR. BIERSTEKER: Thank you.
20 (The taped deposition was played as
follows:)

21 Q. Did you have any understanding during this
time
22 period? This is two years before you got there
but covers
23 at least the entire period that you were in
charege of
24 RJRT. Did you have any understanding that it
was necessary
25 to establish a new brand in the 14 to 18 year
old group?

1276

1 Objection.
2 A. Initially I had not seen this document,
first.
3 Second, I had not seen, that I can recall, any
documents or
4 direction on this particular subject. And when
I arrived
5 there, we did not have any target under 18 years
old, nor
6 did we have any brand -- I can't recall any
brand or brand
7 development whatsoever that was going on in that
particular
8 area.

9 Q. Let me show you next in line. This is an
October
10 31st, 1977 document, and it's trend data drawn
from the
11 April NFO panel line one of the panels that you
earlier
12 identified, and it talks about younger smokers.
It talks
13 about "perhaps because of their higher

susceptibility to
14 fads, peer pressure, et cetera, younger 14 to 18
year old
15 smokers show frequent, short term changes from
one brand to
16 another." It appears that at least people in
RJR are
17 keeping track of that information. Do you
recall seeing
18 documents like that?
19 A. No, I do not recall ever seeing this
document at all
20 or a document similar to this at that time
frame.
21 MR. BIERSTEKER: Can we stop the
tape? I'm
22 lost, because some things I thought were going
to be
23 played weren't.
24 THE COURT: What page?
25 MR. BIERSTEKER: I have no idea
where this tape

1277
1 is.
2 MR. COUGHLIN: We are at page 83,
line five,
3 your Honor.
4 THE COURT: Mr. Biersteker, you need
to go to
5 58.
6 MR. BIERSTEKER: Yeah, they skipped
some
7 portions, your Honor. And I'm trying to
determine whether
8 or not I even need to read them since they
skipped pieces.
9 And I don't think I do at this time.
10 THE COURT: Then we'll go to page 83
then.
11 MR. BIERSTEKER: Although there were
some
12 materials skipped on page 49, I think it would
be useful
13 for me to read still.
14 THE COURT: Why don't you proceed.
15 MR. BIERSTEKER: We'll read those
and start on
16 page 84 with the next exerpt.
17 Page 49, line 15, question by Mr.
Coughlin.
18 Q. While you were at RJRT did you ever
attempt to market
19 to children, those under the age of 18?
20 A. We had no position that I can ever recall
in
21 marketing to anybody in the market under 18
years old.
22 Q. Was that also true when you were with RJR
23 International?
24 A. The same situation. It was a company
policy that we
25 would market products only above 18 years old.

1278

1 Q. And that was a company policy that also
applied in
2 other countries; is that right?
3 A. Yes, it was. As far as I was concerned or
informed,
4 that was the policy.
5 MR. BIERSTEKER: Then I think we can
pick up
6 with plaintiff's designations, which I think is
going to
7 be on page 84.
8 (The taped deposition was played as
follows:)
9 Q. -- appears to refer to the teenage smokers
14 to 17
10 and new adult smokers and quitters memo
underneath. This
11 is in February, 1980, this memo, if you take a
look through
12 it.
13 On the back of the second page it
talks about
14 an attached detailed analysis by Steve Perry,
which is
15 what the February 1st, 1980 document is. Steve
Perry or
16 Stephan R. Perry, Marketing Research
Department, February
17 1st, 1980.
18 Now, is this at a time when you --
what was
19 your position in February of 1980?
20 A. I was Executive Vice President of
Marketing and Sales
21 at that time.
22 Q. So, you were in charge of this department
here?
23 A. This department would have reported up to
me, yes.
24 Q. Do you ever recall seeing a specific memo
about
25 teenage smokers in February of 1980?

1279

1 A. As I look at these documents, I cannot
recall ever
2 seeing them.
3 Q. Do you remember that -- do you remember
receiving
4 information that RJR's -- and this is on the
first page,
5 and it's on the bullet point. It says, "RJR's
share
6 declined from 29.9 percent" --
7 A. Is this on this?
8 Q. "RJR's share declined from 29.9 percent in
1975 to
9 21.3 percent in '79. A large part of the share
loss can be
10 traced to Winston." Do you see that?
11 A. I see that.

12 Q. And it's talking about the 14 to 17 year
olds. Do
13 you see that?
14 A. I see that.
15 Q. Was that your understanding of what had
occurred when
16 you took over in '79?
17 A. Number one, I do not remember ever seeing
this
18 information before. I can't recall ever seeing
it. And if
19 this is the information that was provided by my
attorneys
20 the first time that I can recall seeing
information that is
21 a document was in July of 1980; I didn't know
that there
22 was any information prior to that particular
time, and I
23 had not seen this information.
24 MR. BIERSTEKER: There was some
confusion
25 there, your Honor.

1280
1 THE COURT: Just pick which page you
want to go
2 to.
3 MR. BIERSTEKER: All right, if we
can turn to
4 page 81 through 91.
5 Q. Question: And that was the first time.
Did it
6 refresh your memory about tracking 14 to 17 year
olds?
7 A. No, it really didn't. I didn't remember
at all that
8 we ever tracked that information, but that was
-- the
9 information that I did see was part of an
overall study
10 which was taken by all age groups. And that
information --
11 what would be the word -- was received along
with all the
12 other information. So the companies that
provided that
13 information usually developed it, for example,
18 to 25, 25
14 to 35 and whatever, and information was provided
under the
15 18 year old as it was provided for food
companies or health
16 and beauty aid companies. It was standard
information that
17 would have been provided, not specifically
requested.
18 Q. But the information that was actually
provided to RJR
19 for RJR tracking that information, that was done
in-house;
20 that was done by your own people, some of the
the documents

21 that you saw yesterday you said?
22 There is an objection to form.
23 THE COURT: Overruled.
24 MR. BIERSTEKER: The question.
25 Q. No. RJR wasn't tracking. It was coming
from

1281

1 outside -- outside marketing research companies
that
2 provided information, such as the National
Family Opinion
3 and different organizations. And, as a rule,
most of the
4 companies like that tracked information from
teenagers or
5 children all the way up to, say, 70 years old;
so it was
6 provided from a whole family type information.
7 So, in other words, information such
as 14 to
8 17 would have been provided not only for
tobacco, but soft
9 drinks, foods, health and beauty aid products,
or anything
10 else.

11 Q. Didn't RJR set the parameters of what
information

12 they wanted -- what age groups?
13 A. It was what was provided -- it was
provided to us.

14 We didn't set those parameters. These were a
national
15 research panel information.

16 Q. Then skipping a few lines.
17 Question: And you didn't
specifically keep

18 track of that market share to try to determine
--

19 A. Not that I recall at all. As far as I

remember, the
20 information in any documents that I saw, when
that

21 information was provided, it was provided in --
as a

22 segment of all the other different things. Also
it was
23 covered for male and female and geographic
information. It

24 was part of a whole overall research
information.

25 MR. BIERSTEKER: And then skipping
to page 93,

1282

1 line 15.
2 Q. And did you ever use that information
provided by NFO

3 to market to children --
4 There was an objection.

5 Q. -- or design profiles?

6 A. We never did, to the very best of my
knowledge,

7 market to people under 18 years old.
8 THE COURT: Where do we go now?
9 MR. BIERSTEKER: Now, I think we
proceed to
10 page 105.
11 THE COURT: Okay.
12 Q. Let's take a look at the next exhibit.
This is
13 exhibit number 20. This is an exhibit that I
believe
14 you've seen before.
15 This is a document dated July 22nd,
1980, and
16 it's from you, to -- now, who is that? Is that
Mr.
17 Horrigan?
18 A. That's E. A. Horrigan, yes.
19 Q. E. A. Horrigan -- that's a different
Horrigan than
20 the TI?
21 A. No. There is only one Horrigan. That's
the same
22 Horrigan.
23 Q. That's the same Horrigan?
24 A. He moved over from International over to
the U.S.
25 company.

1283
1 Q. Okay. So, he was with R.J. Reynolds?
2 A. Yes, he was with R.J. Reynolds, and his
position was
3 President of the company at that time.
4 Q. Was he also with the Tobacco Institute?
5 A. He had nothing to do with it. I mean,
when I say
6 "nothing", he was not a paid member of the
Tobacco
7 Institute. If he was on the Tobacco Institute
board, it
8 was because of his position at RJR.
9 Q. This document talks about the Marketing
Development
10 Department report on on teenage smokers, the one
we just
11 looked at. Do you see that?
12 A. Yes, I do.
13 Q. And it talks about Marlboro having a 52
percent
14 share. Do you see that?
15 A. Yes, I do.
16 Q. And that's of that underage market. And
it talks
17 about RJR's total share decline of 21.3 to 19.9
as noted in
18 page one of the July 18, 1980 memo. Do you
recognize that?
19 A. Yes. I see that.
20 Q. And then it says -- or you say, "hopefully
our
21 various planned activities that will be
implemented this
22 fall will aid in some way in reducing or

correcting these

23 trends." And that's in the the 14 through 17
year old
24 market.
25 Objection.

1284

1 Q. That's what that refers to.
2 Objection.
3 Is that a question or statement?
4 Q. Isn't that correct?
5 A. No, it's not correct.
6 Q. Show me on here how it doesn't refer to
that.
7 A. And this is after seeing this document
several times
8 over the last week or two.
9 Q. Well, you wrote it.
10 A. Yes, but I'm trying to reconstruct a
memory in my
11 mind. It was written 19 years ago. And when I
stated in
12 here there are planned activities, keep in mind
I had been
13 with the company, that is, the domestic company
for
14 approximately eight months at this particular
time, and my
15 assignment on an overall basis was to analyze
everything
16 that was going on with the company, to identify
the
17 problems, to identify the objectives and the
strategies.
18 And after I had the opportunity then
to see
19 other documents which were written at that same
period of
20 time or right after that same period of time,
it became
21 quite clear that I had approximately 18 --
excuse me. I
22 think it was 14 major objectives for things
that had to be
23 done to correct the company.
24 I had -- keeping in mind, that my
office and
25 Horrigan's were alongside of each other for
maybe four

1285

1 years, we had the opportunity to have
conversation daily
2 or, if not daily, every other day, and at that
time I
3 certainly kept him aware of all the activities
we were
4 doing. And these activities had to do with
product
5 quality, with manufacturing, with sales, with
media, with
6 brand advertisements, changing advertising
agencies. We

7 had so many things going on at that time it
would be fair
8 to say there were very few things in the entire
company
9 that we were not planning to change.
10 And this is why I was referring to
changing --
11 I recognize that this is in the context of the
14 to 17
12 years, but it also relates to all of the
attachments that
13 occurred here, and I was referring to the
overall share of
14 the market and the fact that we were losing
share overall
15 market, which was our primary concern. And the
fact we
16 were losing brand share, I believe I didn't go
back into
17 this on Winston, which was also a concern.
This is what I
18 really, as I can reconstructed in my mind, that
I was
19 referring to.
20 Q. Now, you can reconstruct it now after the
fact?
21 A. After I've had a chance to read this
document and
22 read other documents.
23 Q. What other documents are you referring to?
24 A. I presume these are documents that I have
seen from
25 the various attorneys regarding -- that is,
regarding the

1286
which were
2 plans that we had put forth for the company
3 issued about, I think, maybe between three and
six weeks
4 after this.
5 Q. Well, this document, first of all, just
talks about
6 the 14 to 17 year old age group; is that
correct?
7 A. I am talking about all of the attachments,
and it
8 says here attached is the MDD report.
9 Q. It says, "importantly, the report further
indicates
10 that RJR continues to gradually decline," comma,
"and
11 between the spring and fall 1979 periods, RJR's
total share
12 has gone from 21.3 to 19.9." That says
"importantly". Is
13 that correct?
14 A. That's what it says here, yes.
15 Q. And it says "importantly," and you're
referring to
16 the teenage smoker. Why is it important that
you were
declining in the teenage smoker?

17 A. It was important to everything, not just
the teenage
18 smoker. It was important to every one of us
because our
19 profitability for all of our brands was exactly
the same.
20 It didn't make any difference to what age group.
And this
21 information was provided to us relavant to all
the other
22 information that was provided to us. And,
consequently,
23 since we were trying to identify where our
company problems
24 were, we were trying to identify where we were.
25 Q. But when you took over this position, you
started

1287
1 writing specific reports about the teenage
smokers, two
2 that we've seen of that we had no record of
before; isn't
3 that correct?
4 Objection to the form.
5 A. No. I don't remember seeing any of those.
6 Q. You were copied on them?
7 A. You said I wrote them. I don't remember
writing
8 anything like that.
9 Q. No. They were implemented. They were
started to be
10 written when you took over.
11 A. Well, I can't -- that's implying that I
was telling
12 these people to write the memos, and I can't say
that.
13 Q. I think it started when you got there.
14 Objection as to form.
15 A. No, I don't think that that's fair at all.
16 Q. You don't think it's fair to say that in
this memo
17 that "hopefully, our various planned activities
that will
18 be implemented this fall will aid in some way in
reducng or
19 correcting these trends," when right above it
you're
20 referring to --
21 A. I think of the documents that we -- I do
not know
22 whether they're in your possession. I think
that whether
23 they are or not, I really couldn't tell. But I
know they
24 were in the possession of other attorneys that
I've had the
25 chance to see, clearly indicate that we had
plans to cover

1288
1 it anywhere from 12 to maybe 15 or so different
areas, and

2 this -- these were the things that I was
referring to.
3 Many, many, many things had to be
done within
4 the company. And that was product quality. It
was
5 manufacturing. It was sales. It was
marketing. It was
6 advertising, and about you name it, and that's
what this
7 covered, and it was a very, very broad front.
8 Q. And part of your plans, though, also
covered this 14
9 to 17 year old group?
10 A. No, it did not. However, our marketing
plans clearly
11 said younger adult market, 14 to 18.
12 Q. I would agree with that.
13 A. I meant to say 18 to 24.
14 MR. BIERSTEKER: 119. Exhibit
Number 22.
15 Q. Let me show you Exhibit No. 22. This memo
is dated
16 December 8th, 1981. It says, "Aging 18 year old
smokers
17 into NFO panel data."
18 "The purpose of this memo is to
recommend aging
19 all known under 18 year old smokers into the
NFO panel
20 data at age 18 and classifying them as
continuing
21 smokers." Do you see that?
22 A. Yes, I do.
23 Q. Had you ever seen this memo before?
24 A. I have never seen this memo before, to the
best of my
25 knowledge.

1289

1 Q. So, you had no knowledge before today that
the
2 company did this?
3 A. I can't recall or remember anything like
this.
4 Q. I'll show this to you and mark this, what
has been
5 marked as 23. Do you remember keeping track of
the actual
6 numbers of 12 to 17 year old smokers that
occurred in the
7 total population?
8 A. I do not recall or remember this, and I
don't recall
9 or remember seeing this -- ever seeing this
document.
10 Q. This document says the total population.
12 to 17,
11 22 million smokers age 12 to 17, 2.6 million.
Do you see
12 that?
13 A. Yes, I see this.
14 Q. Did you have any knowledge that there was

about the
smoking? 15 number of teenage smokers 12 to 17 that were
information like 16 A. I don't remember ever seeing any
17 this.
18 Q. Did you ever issue any orders to try to
figure out 19 the price elasticity of teenage smokers, 12 to
17 year 20 olds?
21 A. No, I would not, that I can ever recall
doing that.
22 Q. Did you ever review this information, that
if the 23 prices were 10 percent higher, the 12 to 17
incidence would 24 be 11.9 percent lower? Did you know that
information? 25 A. No, sir. I never remember ever seeing
this
1290
before. 1 information before or recall anything like this
three to one 2 Q. And then it says under there about the
-- by 24 3 for 18 year olds, and it says by 21 the odds are
you see 4 this odds are 20 to one, to take up smoking. Do
5 that?
6 A. I see it.
7 Q. Did you consider while you were there
raising the 8 prices to lower the age of teenage smoking?
9 A. No. I never remember any discussion on
anything like 10 that, that I could ever recall.
11 Q. Did you have any discussions about if you
did raise 12 the price that you would lose the teenage
smokers that were 13 important to the growth of the industry?
14 A. I can never remember any discussion that
related to 15 price and teenage smokers.
16 Q. Do you recall you were given this
information at this 17 time frame?
18 A. No. I actually do not remember this
document 19 whatsoever.
20 Q. It talks about "an unusually strong
commitment from 21 executive management will be necessary." Do you
remember 22 being asked for that?
23 A. I can't remember this document at all, and
I can't 24 remember her, and I can't remember -- she
certainly 25 wouldn't have been in any way responsible for

requesting me

1291

1 to make this, and I do recognize that the --
that this was 2 sent to me, but I can't remember that we ever
made any type 3 of a commitment of that nature. We were more
involved, 4 fortunately -- or unfortunately, in what we call
short term 5 sales or short term profitability and not long
term. 6

7 MR. BIERSTEEKER: And then there are
a few 8 questions I have designated.

9 Let's take a look at the next page,
34. It 10 says, "pricing is a key issue in the industry"
on the 11 bottom of the page under "pricing".

12 A. Yes.

13 Q. "Some evidence suggests that younger adult
smokers 14 are interested in price, but unlikely to adopt
the brand 15 whose only 'hook' is price." To maximize the
possible 16 pricing opportunity among younger adult smokers,
"several 17 alternatives should be considered." And then
you flip 18 over. It lists 3 strategies. Do you see those?

19 A. Let's see.

20 Q. If you take a look at those.

21 A. Yes, I see this.

22 Q. Did you implement these strategies, to
your 23 knowledge? Do you remember?

24 A. We developed a price value brand, and it
was called 25

26 Doral, but the primary purpose of that -- of the
27 introduction of Doral was to enter the price
value segment, 28

1292

1 which was growing quite high -- excuse me --

quite fast as 2 a result of entries in there by Brown &

Williamson, by 3 Liggett and Myers, I believe subsequently by

Philip Morris. 4

5 And so we felt to be competitive, it
was 6 necessary to introduce that particular brand.

But as far 7 as I can recall -- and it is trying to recall

-- the 8 primary consumption of those products was in

the market of 9 45 to 50 years old and older. It was an older
segment 10 brand.

10 (The taped deposition was played as follows:)
11 A. I was president of the U.S. company at that time,
12 yes.
13 Q. Did anybody ever caution you about the use of
14 the Funny French Camel because it had so youthened,
15 y-o-u-t-h-e-n-e-d, the brand?
16 A. First of all, I never saw this -- I never remember
17 ever seeing this document before. I'm looking at it for
18 the first time. And, no, I don't remember anybody ever
19 cautioning me about it. I think the situation with the
20 Funny French Camel had been passed out of existence, I
21 believe, for years at this particular time.
22 Q. Do you remember RJRT's interest in bringing
23 paraphernalia of the Funny French Camel design over to the
24 United States at this time in '85?
25 A. I honestly don't. Until you brought it up before, I

1293

1 didn't remember we ever did that, no.
2 Q. And you flip that in to the first page it says,
3 "background". It says, "due to the importance of younger
4 adult smokers," comma, "Camel has developed a new
5 advertising campaign which is directed solely towards this
6 group." Do you see that?
7 A. I see that.
8 Q. Do you remember that occurring?
9 A. No, I do not.
10 Q. If you flip over to the next page, it talks about --
11 on bullet point two it says, "French Camels". It says,
12 "these ads were well-received due to the fun/humor aspects
13 of the cartoons," period. "More than any other theme,"
14 comma, "the French Camels appear to attract the respondents' attention," period.
15 "The main drawbacks of these
16 executions were
17 that: One, they may be more appealing to an even younger
18 age group, and, two, there is some confusion as to the
19 meaning behind them." In parens, "some focus group
20 members were hard pressed to explain the purpose of the

21 ads." Do you see that?
22 A. I see that.
23 Q. Were you ever informed about that?
24 A. No, I do not recall this document or these
particular
25 situations at all.

1294

1 Q. If you flip into where the ads start and
you take a
2 look on the bottom there's some Bates range
numbers, and
3 I'm taking a look at 977. Do you ever remember
seeing this
4 spikey-haired French Camel?
5 A. I never remember seeing anything like this
before.
6 Q. Well, in 1987 it was the 75th anniversary
of the
7 Camel brand. Do you remember that?
8 A. I forgot totally about it until you
mentioned it a
9 little while ago.
10 Q. And it was a big deal. The company made a
big deal
11 about the 75th anniversary. Do you remember
that?
12 A. I told -- you know, that's going back 12
years ago,
13 and I'm trying to reach for the fact that -- I
can't
14 remember the details of it. I remember now or
recall the
15 fact that we did something on it. What we did,
I haven't
16 any idea.
17 Q. Well, it was the largest, let's say,
anniversary that
18 the company had ever -- as far as expenditures
that the
19 company had ever had. Do you remember that
detail?
20 A. I do not remember that, no.
21 Q. Okay. And you don't remember Mr.
Horrigan, the head
22 of the whole company, writing you and expressing
his
23 concern about the direction the campaign was
going?
24 A. I do not remember that he did that, no.
25 Q. He never expressed to you he was concerned
about the

1295

1 campaign was aiming too young?
2 A. I never remembered any conversations or
directions
3 from Mr. Horrigan on that.
4 Q. Do you remember getting this from
Horrigan?
5 A. I never remember this whatsoever. I have
no memory
6 of this.

7 Q. You can't remember any discussion with him
or concern
8 that he had about the advertising direction for
Camel?
9 A. No. And I'm surprised to see this. I do
not
10 remember it at all.
11 Q. Let me show you Exhibit Number 32, and it
was in a
12 folder produced to us. It says, "youth target"
on the
13 front produced by RJR. If you flip over it says
October
14 15th, 1987, and it has to do with Project LF
Potential Year
15 1 Marketing Strategy. Do you remember what that
project LF
16 was -- the wider cigarettes -- Camel Wide? Do
you remember
17 that?
18 A. I was reaching right now trying to
remember what the
19 codes are because new products -- all new
products had
20 codes for security reasons, and I remember that
there was a
21 wider cigarette concept. Whatever happened to
it, I don't
22 know.
23 Q. Do you remember that it was primarily
directed at the
24 13 to 24 year old Marlboro smoker?
25 Do you see that in the second
paragraph?

1296

1 A. I see what's stated here, but I do not
remember
2 anything like that, no.
3 MR. BIERSTEKER: I have something on
160, line
4 17.
5 Q. Question: The advertising expenditures
that you
6 expended, were they -- what were they done for?
Were they
7 to get switchers as well as the new smokers?
8 A. Our strategy was devoted entirely, as far
as I was
9 concerned, to brand switching. And it was --
that's what
10 we were aimed at. Mostly all of our brand
strategies, that
11 I can remember, for each brand was to gain the
switchers
12 from some other brand, and we felt we had a huge
market out
13 there, and you could gain those from that
particular area.
14 MR. BIERSTEKER: Your Honor, if we
could.
15 MR. COUGHLIN: Your Honor, this is
the subject

16 of a motion in limine on the Teague documents.
17 MR. BIERSTEKER: This, right here.
They are
18 apparently planning to show the Teague
documents split
19 screen. As you recall, that was the one we
gave you the
20 excerpts of deposition where he didn't finish
it. It was
21 a draft of part of his work at the University.
I think it
22 is not relevant as an admission of what the
company was
23 thinking about, and also I think it is highly
prejudicial
24 under the circumstances.
25 THE COURT: I'll overrule it, I
think.

1297
1 MR. BIERSTEKER: It is not a hearsay
objection
2 as much as it has to do with the relevance of
the document
3 and what its probative value, given the
prejudice, was to
4 the articulation of the company policy.
5 THE COURT: Well, I'll overrule the
objection.
6 MR. BIERSTEKER: Thank you.
7 (The taped deposition was played as
follows:)
8 Q. Did you ever receive information when you
were in
9 charge of RJRT regarding nicotine and its role
in smoking?
10 A. I can't recall any nicotine studies that I
received.
11 Q. 1972 by Claude Teague.
12 A. I'd like to initially say that I never did
see this
13 document, recall this document, or have anything
to do with
14 this. This is -- as I look at it, this is
completely new
15 to me.
16 Q. Number 26, it specifically talks about the
strategies
17 and opportunities.
18 A. Right.
19 Q. And Exhibit B specifically, you said, was
public
20 information?
21 A. Yes, it was public information.
22 Q. And you said you didn't remember that 60
percent of
23 your new market was underage smokers; is that
right?
24 A. That's correct.
25 Q. But it was publicly available; so you must
have.

1298

1 A. It was public information, but I still
didn't
2 remember it.
3 Q. So, you knew it at the time?
4 A. I can't remember whether I knew it at the
time. I
5 may and I may not. I don't know.
6 Q. You're saying you didn't know where 60
percent of
7 your new market came from?
8 A. I can't remember at that particular point,
no.
9 Q. You are trying to give your best and
truthful answers
10 here?
11 A. Yes.
12 THE COURT: What page are we on now?
13 MR. BIERSTEKER: I'm sorry. There
was a lot of
14 skipping around there, your Honor. May I have
a moment to
15 collect my thoughts to see if I had a desire to
read.
16 THE COURT: Okay. The jury's going
to be mad
17 if they don't get to hear this whole thing.
18 MR. BIERSTEKER: Oh, we have many
more just
19 like it. I think, your Honor, if we could read
just the
20 excerpt on 189, starting at line 18.
21 Q. Now, we've referred during the deposition
several
22 times to the term "younger adult smokers".
23 A. Yes.
24 Q. What age group, if any, does that
designate -- that
25 term.

1299

1 A. Younger adult smoker, by our company
definition
2 throughout the company, was 18 to 24 years old.
3 Q. And when you were using that term today
during the
4 deposition, were you -- did you have in mind
that
5 definition?
6 A. Yes, I did.
7 Q. Were you ever shown any documents during
this
8 deposition that indicated that the company
actually
9 marketed from to 14 to 17 year olds?
10 A. I have not seen any documents whatsoever
that
11 indicated that. There was information that was
supplied
12 as -- because it came as an overall service
information,
13 but it was basic information, but as far as the
marketing
14 of the product, no.

15 Q. In all the documents you were shown today
by
16 plaintiff's counsel, both the documents that
were that
17 written to you and the documents you had never
seen before,
18 was there any indication that the company
actually marketed
19 to 14 to 17 year olds?
20 A. There was no indication whatsoever on
anything I've
21 seen.
22 MR. BIERSTEKER: That is all, your
Honor.
23 MR. COUGHLIN: I have one excerpt
that got cut
24 that we designated. That's 163 to 164. And
I'll just
25 read the question and answer.

1300

1 Q. 1972 by Claude Teague.
2 A. Answer: I'd like to initially state that
I never did
3 see this document, recall this document, or have
anything
4 to do with this. This is -- as I look at it,
this is
5 completely new to me.
6 Q. So, when you came to the company or even
went to RJR
7 International, you never heard the company
described as a
8 pharmaceutical industry?
9 A. Never, no, not at all.
10 Q. If you flip over to the second page there,
it says,
11 "happily for the tobacco industry, nicotine is
both
12 habituating and unique in its variety of
physiological
13 actions, hence, no other active" -- it looks
like "material
14 or combination of materials provides
equivalent," in
15 quotes, "satisfaction." Do you see that?
16 A. I see that.
17 Q. Is it your understanding that nicotine is
18 habituating?
19 A. No, it is not.
20 Q. And is it your understanding that nicotine
is
21 addictive?
22 A. No, it's not. I don't feel that.
23 Q. What was the company's position when you
were head of
24 RJRT?
25 A. The company's position, as far as that is
concerned,

1301

1 we were not selling an addictive product, and I
didn't

2 think we were.
3 Q. Were you selling a habituating product?
4 A. No, I don't think.
5 Q. And you didn't target children?
6 A. We absolutely did not in any way.
7 (End of reading and playing of
deposition.)
8 THE COURT: Would the plaintiff call
your next
9 witness.
10
11 MR. LOMBARDI: Your Honor, this is a
Philip
12 Morris deposition and we have a few different
13 designations.
14 THE COURT: This will be the same
type of
15 circumstance, it will be testimony given under
oath before
16 the trial and videotaped, a transcript retyped
for use at
17 trial. Receive and consider this the same as
if the
18 witness was live. We'll follow the same
format.
19 Some of the questions be will be
read and you
20 will consider the response given by the
response of the
21 witness.
22 MR. COUGHLIN: Could we have two
minutes to
23 summarize that witness?
24 THE COURT: Yes, you can. Again,
this is not
25 evidence, but an opportunity for the parties to
comment on

1302
1 the evidence. Mr. Coughlin.
2 MR. COUGHLIN: Thank you, your
Honor. This was
3 not Claude Teague. That was Jerry Long on the
tape who
4 was at one time head of RJR International. RJR
5 International is where the French Camel was
over in
6 France. He came back to the United States,
took over RJR
7 Tobacco Company in 1979, '80 as it was
declining against
8 the Marlboro shares.
9 You heard he implemented several
procedures of
10 the documents that came in, that was reviewing
the 14 to
11 17 year old market as the Winston brand was
declining
12 against the Marlboro. And they were looking to
implement
13 a bunch of things in a way to turn it around.
14 You saw one document. It was
written by him to

15 the CEO of that company, to say that we hope
the thing we
16 implement will turn this thing around, which
they target
17 that young market, because they know to survive
and
18 prosper it was necessary to do so.
19 And you saw Claude Teague describing
what they
20 thought about nicotine at that time to the
President of
21 RJRT, and that is Jerry Long. And he didn't
recall a
22 single document while he was there or documents
that he
23 had written. That's not credible for that
individual.
24 THE COURT: Mr. Biersteker.
25 MR. BIERSTEKER: As Mr. Long
explained during

1303
17 year
National
that is the
specifically get
marketed to
pudding. You
them here
I'll eat my
be called by
at this
Morgan, Philip
clear, these
plaintiff
or are
out of the
compelled to
right to
their

1 the course of his deposition, the data on 14 to
2 olds that R.J. Reynolds had came as a packet of
3 information on surveys from families that the
4 Family Opinion had done some research on and
5 way that data comes in, they didn't
6 Secondly, he never said he never
7 kids. You will remember the proof is in the
8 look at the ads from the fall of 1980. We saw
9 yesterday. If those ads are marketing kids,
10 hat.
11 THE COURT: Would the next witness
12 the plaintiffs. And who is it you wish to call
13 time. Is this keyed, cued up?
14 MR. COUGHLIN: Yes it is. James
15 Morris.
16 Juror 4: Your Honor, just to be
17 are witnesses for the plaintiff, correct?
18 THE COURT: The rules allow that the
19 has a right to call witnesses that either work
20 identified by the defendant. If a witness is
21 State of Ohio, they basically cannot be
22 appear here in person. So, the plaintiff has a
23 go to the location where these people are, take

24 deposition, sworn testimony under oath, and
then if the
25 plaintiff wishes to offer that evidence, the
plaintiff can
1304
1 do so through the procedure of a deposition.
2 I'm not sure where Mr. Morgan is,
but he's out
3 of the State of Ohio. If you have a question
later on.
4 Juror 6: You are mixing these
between the
5 defendants and this is plaintiff.
6 THE COURT: Let me try to make this
clear, and
7 then we are going to move on. The plaintiff in
this case
8 has sought to call some of the witnesses of the
defendant.
9 So, as to the last witness, this was an
executive with
10 RJR. This witness may be an executive with
Philip Morris.
11 They have a right to examine parties on the
other side and
12 to secure their testimony for trial.
13 If that witness is out of the State
of Ohio,
14 they need to travel to where that witness is,
and they can
15 then offer that testimony by way of deposition.
16 So, perhaps in the introduction in
this case as
17 to the last witness, it is my understanding --
the parties
18 can correct me -- this is a witness who had
been employed
19 by RJR. And I think he testified that he was
retired at
20 the time his deposition was taken.
21 Mr. Coughlin, perhaps you will
introduce this
22 witness and who he is.
23 MR. COUGHLIN: And Mr. James Morgan
was the
24 senior executive at Philip Morris. This was a
deposition
25 we went and took of some of these witnesses.
These

1305
1 witnesses are not available, so we put them on
through the
2 deposition testimony here at trial. So, you
can, you will
3 get to see them.
4 MR. LOMBARDI: Just to clarify, Mr.
Morgan is a
5 retired employee of Philip Morris.
6 THE COURT: I'm not sure what
portion we begin
7 with. Have you designated your portion?

8 MR. LOMBARDI: We'll start with ours
on page 57, your Honor.
9
10 THE COURT: Thank you.
11 (Deposition of James Morgan read and played as
follows:)
12 BY MR. LOMBARDI:
13 Q. Line 16. Keeping it on your level of
personal
14 experience. The reason, is it not true, that
your size of
15 the market is affected by teen smoking you need
to know
16 going forward how many smokers there are in the
advancing
17 age population to make predictions?
18 A. Well, again speaking from my own
experience -- and I
19 say this because I'm aware there are a handful
of
20 documents, during the time that I was at Philip
Morris that
21 also looked at below 18, which I am familiar
with those
22 documents through previous depositions, a
handful of
23 them -- but I can speak from personal experience
and say
24 that those documents or that information
relating to the
25 incidence of smoking of people below 18 years of
age was

1306
1 not used in the development of marketing
strategies,
2 marketing programs, marketing executions, or
anything to do
3 with marketing. It was information.
4 And in many cases I don't even know
why it was
5 generated. It was generated by primarily by an
individual
6 in Richmond who worked in R and D. My belief
is that it
7 was generated by that person as part of his
normal
8 demographic analysis, and if it was used, it
was used by
9 the operations people to try and forecast their
required
10 capacity in terms of factory production.
11 Q. Who was the person in Richmond that you
referred to?
12 A. Myron Johnston.
13 Q. And what was his position?
14 A. He was a demographer and statistician in
the R and D
15 Department.
16 (The taped deposition was played as
follows:)
17 Q. I'm not at this point asking you to
connect this June

18 12th, 1970 memo, Exhibit 5, with what may or may
not be the
19 study you recall.
20 A. Okay.
21 Q. I'm going to just simply ask on the study
you recall,
22 okay, was it done during the time you, sir, were
managing
23 Marlboro?
24 A. I do not remember the dates of it, I'm
sorry. If I
25 had a copy right now of this and the Roper study
itself I

1307

1 could answer your question.
2 Q. You have seen that Roper study that
studied people
3 under 18?
4 A. Yes, I have, sir.
5 Q. When did you last see it?
6 A. I last saw it, I guess, in Minnesota.
7 Q. Were you asked questions about it?
8 A. Yes, I was.
9 Q. And to your recollection, what did it
show?
10 A. It showed -- and it's a study that I've
said in I
11 believe almost every deposition because I've
been asked
12 about it -- it shows that Roper tabulated --
asked
13 questions and tabulated data for smokers under
18.
14 And I have characterized it both, in
many ways,
15 an anomaly, a break from a our pattern, and
something that
16 I am really embarrassed that Philip Morris did.
17 Q. Well, you're embarrassed also because it
shows, at
18 least on this occasion, Philip Morris did survey
people
19 under 18, right?
20 A. I think that was inappropriate, yes.
21 MR. LOMBARDI: Your Honor, may I
ask, I think
22 something was dropped from plaintiff's
designation. I
23 think we would have designated --
24 THE COURT: Go ahead and answer, ask
the
25 question.

1308

1 MR. LOMBARDI: It's at page 86, line
2.
2 Q. Why are you embarrassed by it?
3 A. Because Philip Morris has said, and I
believe as
4 someone who's been responsible for marketing
more than
5 almost anybody in the company over this period

of time, we
6 do not market to kids; we don't have programs
for kids, and
7 we have really carefully avoided even doing
research among
8 kids.
9 And this one report is -- has part
of it a tab
10 on people under 18 and their smoking habits,
that's why I
11 am embarrassed; because it is an exception to
the rule.
12 And it is like a lightning rod the way it's
used to
13 suggest that we market to kids.
14 (The taped deposition was played as
follows:)
15 Q. What's a tracking study?
16 A. A tracking study is something that Philip
Morris did.
17 It's a telephone survey of smokers and getting
different
18 kinds of information from them about what brand
they smoke
19 and how they perceive certain brands and getting
20 demographic information also.
21 Q. Taking page one there at the top, there's
a quote:
22 "Do you yourself smoke cigarettes, that is, at
least a pack
23 a week?" Question mark.
24 Is that the question that was asked
of the
25 respondents on page one?

1309
1 Q. I do not know specifically, but it would
appear to
2 be.
3 Q. Okay. Would you turn, please, to Bates
marked
4 2041761795, that page that's part of this
exhibit. It's
5 called table 4. This do you see it?
6 A. Yes, I do.
7 Q. Headline at table 4 is "incidence of
smoking by
8 demographic group."
9 A. Yes.
10 Q. And then next line it says age 12 to 17,
March '73;
11 have I read that correctly?
12 A. Yes, you have.
13 Q. And then there's another quote there: "Do
you
14 yourself smoke cigarettes, that is, at least a
pack a
15 week?" Question mark.
16 And again, does that appear to be
the question
17 you asked of the respondents on --
18 A. It appears to be.
19 Q. You'll note on this chart, also on the

left-hand
14 to 15
correct?
according

20 side, subgroups of people 12 to 13 years of age,
21 years of age, 16 to 17 years of age, correct?
22 A. Yes.
23 Q. And those responses are listed too,
24 A. Yes.
25 Q. What in the world is Philip Morris doing,

1310
interest in
people 12 to
where this
handful of
Philip Morris
report we
the study
Johnston, which
information
either
of the
at that
will continue
independent
they were
are --
were
marketing

1 to you?
2 You said Philip Morris has no
3 gathering information about smoking habits of
4 17 years in March of 1973.
5 A. Well I said -- first of all, I do not know
6 is from.
7 Q. Sure.
8 A. I said to you earlier on, there are a
9 documents that exist that demonstrate that
10 did in fact either -- in the case of the Roper
11 discussed before, actually in that case initiate
12 of that information; or in the case of Mr.
13 there are several memos from, compiled public
14 and tabbed below 18.
15 Q. And this is one of them?
16 A. And this is -- I don't know that this is
17 Mr. Johnston or Mr. Roper, but this would be one
18 handful of documents where Philip Morris looked
19 information.
20 And since this post dates 1963 I
21 to state, because I know it's the truth, that
22 of those pieces of statistical information that
23 not used for marketing purposes and that there
24 there are no documents that reflect that there
25 marketing programs, strategies, evaluations of

1311
did not
are going to

1 programs.
2 And the plain and simple fact is we
3 market to kids, even acknowledging that there
4 be some number of documents that show

statistical

5 information relating to below -- smoking by

below -- among

6 people below 18 is information that exists in
Philip

7 Morris' files.

8 Q. Showing you --

9 What was the information in Exhibit
6 used for?

10 A. Well, since I was at this point probably

director of

11 brand management or brand marketing it came

through me, I

12 will tell you that this information was not used

at all for

13 marketing.

14 MR. LOMBARDI: Your Honor, again, I

think we

15 dropped something from the plaintiff's

designation. I

16 believe if we could go back.

17 THE COURT: Back the tape up just a
bit, and if

18 you want to ask some questions, go ahead.

19 Q. Thank you, your Honor.

20 MR. WEBER: I believe it's page 93,
line 7.

21 Q. Does this document, Exhibit Number 6, fall
under the

22 category of documents that embarrass you?

23 A. No.

24 Q. This one doesn't?

25 A. It's because I don't know what it is. I
don't know.

1312

1 Q. Well, you and I can agree it comes from --
as I say,

2 I represent to you it comes from Philip Morris'
files, and

3 it shows clearly Philip Morris acquiring data
regarding the

4 smoking of people 12 to 17.

5 A. Well, I don't know if it acquired it or
not. Because

6 I don't know -- I know in several of Mr.
Johnston's memos

7 that it's U.S. Public Health Service
information.

8 Q. Okay.

9 A. -- or Chilton or the Centers for Disease
Control, or

10 things like that.

11 Q. Even if even if it came from a public
source, they

12 acquired it, didn't they?

13 A. They acquired; yes, they looked at it and
reported it

14 on.

15 Q. Reported on it?

16 A. Yes.

17 MR. LOMBARDI: And I think that's
where we

18 were.
19 (The taped deposition was played as
follows:)
20 A. Well, since I was at this point probably
director of
21 management or brand marketing it came through
me, I will
22 tell you that this information was not used at
all for
23 marketing.
24 Q. By you?
25 A. By me or the marketing organization.

1313

1 Q. Does it say anywhere on Exhibit 6 it
should not be
2 used for marketing?
3 A. No.
4 MR. LOMBARDI: Your Honor, again I
think we've,
5 I think if I could begin at the bottom of page
94,
6 question, at line 16.
7 Q. So, they just threw it away; is that it.
8 And then there are objections and
the witness
9 answers:
10 A. I said I don't know what it was was used
for. It may
11 may have been used by -- again, during this
period of time
12 there was a Richmond factory being built; there
was a
13 Cabarus, North Carolina plant being considered.
14 It could have been used by
statisticians to try
15 and project the size of the industry five and
ten years
16 out so they knew what size plant to build.
17 I don't know; it was not used for
marketing.
18 (The taped deposition was played as
follows:)

19 Q. You're proud of it?
20 A. I didn't say that. It doesn't trouble me.
21 It's part of what I already
identified as a
22 handful of documents that have data on them for
smokers
23 below 18.
24 I'm not embarrassed by it. I wish
it hadn't
25 happened.

1314

1 And I understand in the context of
hundreds if
2 not thousands of market research reports there
are this
3 handful of documents that exist; I'm not
perfect.
4 MR. LOMBARDI: Your Honor, there was
another

5 one dropped.
6 Q. Why do you wish it hadn't happened?
7 A. Because I'm sitting here today in a
deposition where
8 the cigarette industry and Philip Morris are
being accused
9 of marketing to kids, and I know we didn't. And
these are
10 the kinds of documents that people are building
the case on
11 in spite of the fact they have no marketing
documents that
12 show programs or strategies to market the kids;
and it's
13 sort of an annoyance that these documents exist
and become
14 a platform for people to make accusations that
are just
15 simply not true and can't be proven other than
by
16 suggestion because of these documents.
17 Q. But don't the documents, even the few you
reviewed so
18 far, suggest, at least in one perspective, that
Philip
19 Morris was marketing to people under 18?
20 A. Absolutely not. It says that Philip
Morris as a
21 business, for whatever reasons, was looking at
the
22 incidence of smoking among people under 18.
There's no
23 suggestion in these documents -- not one single
suggestion
24 that I've been shown in five depositions, one
trial
25 appearance, there's no suggestion or evidence
that Philip

1315
1 Morris marketed to people below 18; there's just
not.
2 There are 250 thousand marketing
documents
3 sitting in a Minnesota warehouse, 250 thousand,
and nobody
4 has shown me a document that says Philip Morris
marketed
5 to people below 18.
6 (The taped deposition was played as
follows:)
7 Q. Should Philip Morris have been studying
whether
8 teenagers are susceptible to advertising of
Philip Morris
9 cigarettes?
10 A. No.
11 Q. That's something they shouldn't have done?
12 A. No.
13 Q. Exhibit 12, as I've indicated, says:
Marlboro
14 dominates in the 17 and under age category,
capturing over

15 50 percent of the market.
16 Is there any statement in here, in
this three-
17 page memo, that says that we should not be
causing people
18 17 and under to smoke Marlboros; there's
nothing in here
19 that says that, is there?
20 A. No, there's nothing in here that says
that.
21 MR. LOMBARDI: I think 170, line 21.
22 Q. My question was: in the 1990's did the
advertising of
23 Philip Morris have anything to do with the
increase in teen
24 smoking?
25 A. I don't believe so, because I don't
believe that

1316
1 advertising has anything to do with the decision
to smoke,
2 it's peer pressure. And studies show that
advertising --
3 Q. Well then, why do you advertise?
4 A. To get brand switchers from existing
smokers and to
5 hold on to the smokers you have.
6 (The taped deposition was played as
follows:)
7 Q. Most particularly, and I'm reading it
correctly I
8 hope, the Roper organization was commissioned to
undertake
9 the study summarized here, with the intention of
probing
10 the dynamics of the market among smokers below
the age of
11 24. This was not the usual sample of age 18 to
24; in this
12 study, no lower age limit was set.
13 A. Correct.
14 Q. Who determined that this study would not
cover just
15 18 to 24 but would go lower?
16 A. I do not know.
17 Q. Do you know why the lower age, that is to
say, the
18 teenage group of people, was water was covered
by this
19 study?
20 A. I believe if you -- from reading the
report, that
21 what this was looking at was a concern that the
menthol
22 category, which Marlboro did not participate in,
the
23 menthol category was becoming more popular among
smokers 18
24 to 24 and -- as I've said about this report many
times,
25 this is the report that I said I'm truly
embarrassed by --

1317

1 that it was decided to take a peek at what was
happening in 2 the menthol brands below 18.
3 Q. Why now are you saying you're embarrassed
by this 4 report, this Exhibit 16?
5 A. Because this report says this was not the
unusual 6 sample of 18 to 24 in this study, among lower
age limits. 7 This is a clear -- this is a clear
example of 8 where -- what I consider to be a policy of not
9 researching -- initiating Philip Morris
sponsored research 10 below the age of 18 was not followed and, from
this memo, 11 it was not followed quite consciously.
12 Q. Did you ever, during your service at
Philip Morris, 13 hear about the study that's reflected in Exhibit
16? 14 A. I said -- while I don't remember literally
reading 15 it, I would be very surprised if I had not read
it at the 16 time it was published. This would be the kind
of study I 17 would read.
18 Q. Well, on that predicate then would you
reject it as 19 going under 18 years of age in its research?
20 A. No, because in 1974 I am not sure that I
understood 21 how I'd feel about this study sitting here
today. 22 I would have assumed someone made a
decision 23 that it was okay to do. And I am just not sure
I would 24 have had -- I mean I had been with the company
ten years 25 at that point, I was 32 years old.

1318

1 I'm not sure I would have had at
that point the 2 wisdom to see this and go: Oh, my gosh, why
did they do 3 this, this thing -- this is ridiculous, we
shouldn't be 4 talking to those people. I just wasn't in a
position in 5 the organization to even think like that at
that point. 6 Q. But you were in a position in the
organization to 7 stop it at that time?
8 A. No, I was not.
9 Q. If you would have said no they wouldn't
have done

10 it?
11 A. No.
12 Q. S thes, rise in 1970, the contained in the
documents
13 that I show, the threr #BAR?
14 MR. LOMBARDI: At 201 line 20.
15 THE WITNESS: George, I think at the
top of
16 page 120, line 20.
17 BY MR. LOMBARDI:
18 Q. If you would have said no they wouldn't
have done it?
19 And if you are saying that in 1974,
if this
20 came to your attention, accepting your
predicate for a
21 moment, you would have approved this or would
not have
22 objected to it; is that a a fair summary of
what you just
23 said?
24 A. I think I would not have been sensitive
enough of
25 this, the implications of this study --

1319

1 Q. As you are now?
2 A. As I am now, yes.
3 And then, therefore, the answer to
your
4 question is I think there is -- I think if I
had been in a
5 position to approve it that's the hypothetical
in it, I
6 wasn't; if I was I think there's some chance
that I would
7 have approved it.
8 And I don't -- I'm embarrassed to
say that too.
9 Not only am I embarrassed about the poll, I'm
embarrassed
10 to say that my mind set at that point might not
have
11 understood the implications of that.
12 Q. Why are you embarrassed to say that?
13 A. I wish at age 32 I had been, I wish at age
32 I had
14 been -- had the wisdom to look at it if I had
been in the
15 position to say no, no, no, no, I don't care, I
don't care,
16 we're just not going to do that.
17 Q. 201, line 20. The question is, if you can
answer it,
18 what action, if any, did you take in reading
such memos as
19 Exhibit 18 then and there to reduce or stop the
sale of
20 Marlboro cigarettes to people under 18?
21 A. I will tell you this that, as I remember
it, being
22 involved in Marlboro at that time, all through
the 70's and

23 until I left in '83, we constantly lived with
the fact that
24 we had to be responsible in terms of our
marketing program
25 and make sure that we did nothing that would
encourage the

1320

1 purchase of cigarettes by people under 18. And
there were
2 a whole bunch of big actions and little actions
that were
3 taken that made sure that we marketed legally.
4 We had the Federal Trade Commission
watching
5 us. We have anti-smoking groups like GASP and
ASH that
6 would look at everything we did and would
scream bloody
7 murder if they thought we were doing something.
8 We acted really responsibly and did
a whole
9 variety -- nothing as formulated, organized and
huge as
10 what we talked about before, Action Against
Access, but we
11 did a whole bunch of things within the market
to make sure
12 that we did not market to people below 18.
13 (The taped deposition was played as
follows:)

14 Q. Did you publicly disclose in these
documents that
15 I've shown you that clearly show your company --
not you
16 individually, but your company collectively was
aware that
17 its products were being sold to people under 18;
did you

18 share that with the public?
19 A. Well, that they were being smoked by
people under

20 18 --
21 Q. Right.
22 A. -- not necessarily sold. This is not
necessarily

23 sold. There's a semantic difference.
24 Q. Did you make public this information?
25 A. I don't believe so. The government did, I
didn't

1321

1 have to.
2 Q. They didn't have your information; did
they? This
3 wasn't --
4 A. This is all government data.
5 Q. No, sir. The correlation between Marlboro
sales and
6 so forth.
7 I showed you a document a minute
ago, your own
8 internal document, which showed that Marlboro

had the

9 deepest penetration in the teenage smoking
market; did you

10 make that known, you the company?

11 A. I don't believe so.

12 I believe if you look at security
analyst

13 reports, that they would always comment on
Marlboros'

14 strength among younger smoking ages. I don't
think it's a
15 secret.

16 Q. Do you know that some people who smoke are
addicted
17 to smoking?

18 A. I do not believe that cigarette smoking is
addictive
19 by the medical definition of addiction.

20 I believe that people like to smoke.

I believe
21 that smokers enjoy smoking. And I believe they
like the

22 pleasure of smoking; but I don't think that
they're

23 addicted as a medically accepted term.

24 Q. Okay.

25 MR. LOMBARDI: There is some, your
Honor, at

1322

1 page 215, line 8.

2 Q. Okay. Putting aside the medical
definition, do you

3 believe that smokers are addicted under any
definition?

4 A. I believe that smokers can be sort of
psychologically

5 addicted to cigarettes.

6 And so when I come back and I say,
yes, I agree

7 smokers regularly use cigarettes at times of
stress, the

8 part of that statement I agreed with, I believe
that and I

9 think that at times of stress people want a
cigarette.

10 Q. Why do you say, in your testimony here,
that smokers

11 can be psychologically addicted?

12 A. Because I believe when a smoker, who
enjoys a

13 cigarette and likes to hold it in their hand and
likes to

14 puff on it, is in stressful situations, I
believe their

15 cigarette is reassuring, it's comforting to
them.

16 Q. That's your analysis of psychological
addiction?

17 A. To me. As I'm describing it, yes; my
understanding,

18 my feelings about it.

19 Q. What is your understanding of the medical

definition

20 of addiction?

21 A. Well, my understanding of the medical

definition of

22 addiction is that addiction, as defined

classically in

23 medicine, requires three things, neither of

which

24 cigarettes exhibit.

25 The first one is that to be

addictive you take

1323

1 ever increasing dosage; and I believe that

every study of

2 cigarette smoking shows that people over the

course of

3 their smoking lives do not increase dosage, in

fact, at a

4 point start decreasing both the number of

cigarettes they

5 smoke as they get older and, generally, they

start smoking

6 low tar nicotine cigarettes, so that there's

not this

7 constant need for ever increasing dosage.

8 MR. LOMBARDI: That's all, your

Honor.

9 THE COURT: Would the plaintiff call

your next

10 witness.

11 MR. COUGHLIN: Your Honor, should we

have the

12 two minute summary?

13 THE COURT: Again, it is an

opportunity for the

14 parties to comment on the testimony, but it is

not

15 evidence.

16 MR. COUGHLIN: Ladies and gentlemen,

this is

17 James Morgan. We put him in in our case and

you can take

18 a look at James Morgan, who's in charge of

Marlboro, and

19 Jerry Long that became in charge of the Camel

campaign.

20 How did all these studies tracking teenagers

show up in

21 their files? They say it just happened, just

this and

22 just that. These were key studies produced by

the top

23 people in the studies. It is from the,- in the

last

24 instance, the guy who became the CEO.

25 These aren't isolated incidents.

And it's not

1324

1 coincidental at the time they are tracking and

doing these

2 studies that their brand takes over and

dominates in that

3 age group. That's what happened with Marlboro.
4 And when Joe Camel was introduced,
that's what
5 happened then. It is not a coincidence that
they take a
6 look at the teenagers to reverse the trends
that are
7 occurring in the products. They know they need
them, as
8 Mr. LeBow testified to survive, they need the
new smoker,
9 not the switcher.

10 Thank you.

11 MR. BIERSTEKER: Ladies and
gentlemen, you got
12 a chance for the first time to kind of meet a
person in
13 the Philip Morris marketing department. James
Morgan was
14 the head of marketing for Philip Morris for a
while. You
15 heard him talk about he was head of Marlboro
for a time.

16 You heard a couple of significant
things from
17 him, and you saw there were a few documents on
a limited
18 topic. He told you there were hundreds of
thousands of
19 marketing documents out there, you know, there
were
20 studies by Myron Johnston. And you heard

yesterday Myron
21 Johnston was not in the department at --
Marketing
22 Department at Philip Morris, and his work was
never used
23 in any way marketing at Philip Morris.

24 Mr. Morgan admitted there was one
document, one
25 document out of hundreds and thousands of
documents that

1325

1 existed at Philip Morris, he was embarrassed
by. But he
2 said that document had absolutely nothing to do
with any
3 marketing that he did at Philip Morris.

4 And that's the key fact that Mr.
Morgan
5 testified to, that none of these studies that
were the
6 subject of this limited deposition extract were
used to
7 market. And Philip Morris did not market to
youth or to
8 children.

9 THE COURT: Thank you.

10 MR. LOMBARDI: Thank you, your

Honor.

11 THE COURT: Would the plaintiff call

your next

12 witness.

13 MR. COUGHLIN: Yes, your Honor.

We'll

14 introduce Mr. Helmut Wakeham from Philip

Morris. He will

15 be next. He was a scientist at Philip Morris,

and you

16 will hear his testimony.

17 THE COURT: Thank you.

18 Again, this is testimony taken under

oath

19 before trial. Receive it and accept it as if

the witness

20 was testifying live. Mr. Coughlin, are you

keyed up then

21 on page 216.

22 MR. COUGHLIN: I think that we are,

your Honor.

23 You can just start.

24 HELMUT WAKEHAM DEPOSITION PLAYED AS

FOLLOWS:

25 Q. Showing you Exhibit 158, memorandum

bearing Bates

1326

1 stamp number 1001881991, dated November 15,

1963, this is a

2 memo from you to Dr. Bavley, correct?

3 A. Yes, sir.

4 Q. Dr. Bavley was some -- a scientist

reporting to you?

5 A. Yes, sir.

6 Q. Okay. And in this memo you told Dr.

Bavley that,

7 quote, "the lawyers have taken exception to my

statement

8 that the cardiovascular problems, if any, are

related

9 essentially to the physiological effects of

nicotine." Do

10 you see that line?

11 A. I see the line, yes.

12 Q. And that was your view in 1963, that

cardiovascular

13 problems, if any, were related essentially to

physiological

14 effects of nicotine; correct?.

15 Objection.

16 A. I believe this states fairly what I felt

at the time,

17 yes.

18 Q. And you told Dr. Hausermann, quote --

19 MR. LOMBARDI: If you could hold a

second.

20 MR. COUGHLIN: We skipped 222, 223,

and going

21 to 227.

22 MR. LOMBARDI: Okay.

23 Q. "It is true that a particular individual

appears to

24 have some kind of consistent puff profile, but

it is also

25 true that individuals change the duration and
volume of
1327
1 their puffs when they make radical changes in
the types of
2 cigarettes being smoked," close quote. You told
them that,
3 correct?
4 Objection as to form.
5 A. Well, our experience was that if the --
that --
6 First place, our experience was that
people --
7 no two people smoked alike. We measured puff
patterns for
8 individual smokers, and in -- in a hundred
smokers, for
9 example, there were no two patterns that were
similar.
10 The patterns that we got were similar to the
type of thing
11 that you observed in -- in an electrocardiogram
where
12 you -- you get some kind of a pattern of the
rate at which
13 the individual draws on the cigarette as a
function of
14 time. No two people smoke the same way.
15 People develop certain habit
patterns for
16 puffing, and if they are now given a cigarette
which has a
17 different delivery, a radically different
delivery,
18 they are recognizing a difference in the smoke
which
19 they are receiving, and they make some changes
in their
20 puffing pattern as a result of that
recognition.
21 Q. Okay. And in this memo in 1979 you
expressed the
22 opinion that you did not deny that many smokers
maintained
23 the habit for psychopharmacological reasons?
See that?
24 A. That's what I said, yes.
25 Q. And this is some 20 years after you wrote
that memo

1328
1 to Robert Roper in which you said one of the
main reasons
2 people smoke is to experience the physiological
effects of
3 nicotine on the system; right?
4 A. I said that, yes.
5 Q. And in 1961, you expressed the view that
carcinogens
6 are found in practically every class of
compounds in smoke,
7 right?

8 A. Wait a minute. Class of compounds in
smoke?
9 Forty -- are we 42? Is that where we're going.
10 MR. LOMBARDI: We have one here on
page 255,
11 line 8.
12 Q. In 1961 you were of the view that the fact
that
13 carcinogens were found in practically every
class of
14 compounds in smoke prohibited a complete
solution of the
15 problem by eliminating one or two classes of
compounds;
16 correct?
17 A. Yes. And I'd like to explain that
statement if I
18 may.
19 In the first place, remember that
the
20 definition of carcinogen in -- involved
essentially an
21 animal test, so -- and -- and this was the test
with test
22 animals, and the National Cancer Institute was
at that
23 time embarking on a tremendous program to
identify various
24 substances as to whether or not they were
carcinogenic,
25 and the list they were coming up with in animal
tests was

1329
1 very long. It included, as I recall it,
substances in
2 practically every broad classification of
organic
3 compounds known.
4 In subsequent years the National
Cancer
5 Institute abandoned that program because they
came to the
6 conclusion that it was not giving them any kind
of
7 significant information as to what was a
carcinogen for
8 man and what was not.
9 Let's say they came up with a list
of a
10 thousand things which they thought were
carcinogens by
11 this test. On the other hand, the World Health
12 Organization came up with a list of only
something like 10
13 or 12 or 15 substances which they thought were
14 carcinogenic in man. That's the kind of
discrepancy that
15 existed in the whole area of, you know,
defining what is a
16 carcinogen.
17 Now in 1961, looking at a list of
all those

18 substances which the National Cancer Institute
felt were
19 carcinogenic, and knowing what we knew about
the
20 composition of smoke, I made the statement that
in all the
21 various classes of organic compounds which are
present in
22 smoke, you can find in those classes one or two
things
23 which the National Cancer Institute in its
program had
24 thought were carcinogens. And that was the
basis for this
25 statement which I have made here.

1330

1 Q. But you did consider the chemical
constituents of
2 smoke a problem?
3 A. Well, the problem in terms of defining the
4 composition of smoke from the point of view of
chemical
5 constituents. And I'm referring there to the --
the
6 particulate matter which results from the
burning of the
7 tobacco.

8 Q. And what you told Mr. Cullman in 1962,
after
9 expressing the view that the particles passing
through the
10 filter were were not a problem, was, quote.
"Let's worry
11 about the chemical constituents of smoke.
There's a real
12 problem."

13 A. Yes, sir.
14 MR. BIERSTEKER: Just briefly here
the next
15 line, right?

16 A. And what I meant by that was that there
was a, a huge
17 problem to define the chemical composition of
the organic
18 particulate matter which came through in the
smoke stream.

19 MR. LOMBARDI: Okay.
20 Q. And I direct your attention to page 6
under
21 "Conclusion". Direct your attention to the line
that says,
22 "As a whole one may say that the nitrosamines
are very
23 potent carcinogens, potent mutagenes, that they
have a very
24 good dose response relationship, an astonishing
relation
25 between structure and organotropic reactions,
that their

1331

1 effect on the chemical structure of the attacked

organism

2 is better known than for most carcinogens."

3 Do you see that?

4 A. Yes.

5 Q. Under nitrosamines you indicate to Mr.

Hugh Cullman

6 that you have had those substances under

investigation

7 since early that year, early 1963; correct?

8 A. That's what I said, yes.

9 Q. And you tell him that you have found

indications of

10 their presence, particularly the higher members

of the

11 series, right?

12 A. Yes.

13 Q. In other words, you found indications of

the presence

14 of nitrosamines in cigarette smoke, right?

15 A. Yes.

16 Q. And if I direct your attention to page 3,

you discuss

17 bronchitis and emphysema; correct?

18 A. Yes.

19 Q. And you express the opinion to Mr. Hugh

Cullman that

20 bronchitis and emphysema, quote, are serious

diseases

21 involving millions of people. Emphysema is

often fatal

22 directly or through other respiratory

complications.

23 Do you see that?

24 A. Yes.

25 THE COURT: Thank you.

1332

interim

1 Does the plaintiff want to make any

2 argument with regard to this witness?

3 MR. COUGHLIN: Just briefly, your

Honor.

4 Internally at Philip Morris we have

the

5 scientists now that we are seeing on that tape.

And what

6 does the scientist's finding confirm and deal

with? He's

7 dealing with the fact that they have a product

that has

8 carcinogens; they recognize that internally.

They

9 recognize that so early. You saw some other

documents

10 that came up with Dr. Wakeham's name on it.

11 They recognized it in the '50's.

And they

12 start dealing with it then, but they don't make

it public.

13 They recognize they have real problems, and

they don't

14 make it public.

15 And that's what you see throughout

this trial.

16 You see the CEOs and other people running these
companies
17 taking the position of denying causation of
disease, and
18 denying these, these other things that are
problems with
19 their cigarettes. And the consequences are
deadly.

20 Because internally, and it wasn't
like they
21 didn't know, it wasn't like they didn't know
that they had
22 a product that was deadly -- and we saw the
other
23 documents -- it wasn't like they didn't know
who was
24 taking up their product, and who would be
smoking it.

25 And now we saw one of the examples
of one of

1333

1 the scientists confirming the information
internally they
2 knew. And he didn't say, hey, that was an
abhorrent
3 document, I didn't mean it, I just happened to
write it
4 down. That's what he believed. That's what he
believed
5 in the late 50's early 60's.

6 They knew it was in there. That's
what was
7 going on with these companies. And it wasn't
disclosed to
8 the public at large, not at that time.

9 THE COURT: Thank you.

10 MR. LOMBARDI: We have a little
difference on
11 what Dr. Wakeham said. It, again, is a brief
excerpt

12 dealing with very complicated issues like
carcinogens and
13 things like that. But what Dr. Wakeham said
and what this
14 shows is that Dr. Wakeham was talking about
in-house what
15 had already been pointed out in the literature.
16 He specifically talked about NCI
study, NVS.

17 It is the National Cancer Institute part of our
18 government. The NCI determined whether
something should
19 be called a carcinogen by looking at animal
tests.

20 And what Dr. Wakeham went on to say
from his
21 testimony was those animal tests were
ultimately
22 disappointing to NCI because they didn't show
whether
23 something that was a carcinogen in an animal

would cause
24 cancer in a human. And NCI, Dr. Wakeham just
said,
25 dropped that testing.

1334
1 So what's significant about what Dr.
Wakeham
2 said here is that there is no evidence that Dr.
Wakeham
3 knew anything in-house that wasn't known
outside, and that
4 Dr. Wakeham was discussing what was known
outside.

5 THE COURT: Thank you.
6 Do you have anybody else right now?
7 MR. COUGHLIN: No, your Honor.
8 THE COURT: What's the jury's sense?

You want
9 to break for the night? Okay.
10 Same rules apply over the night
season. Don't
11 read anything about the case. Don't form any
opinions,
12 express any. If you leave your pads face down.
We'll
13 reconvene again at 10 minutes until 8:00. So,
be here at
14 that time.

15 Thanks for the hard work you have
been giving
16 on this case. I do want to express the
apprecation, but
17 we are moving through the testimony a lot
faster than it
18 might while the days, and there has been a lot
of
19 testimony. And I think as a result of that we
are going
20 to have fewer days of testimony.

21 So, again, with the thanks of your
community,
22 we'll stand in adjournment for the day.
23 I would ask the attorneys to stick
around. A
24 juror left a note: We were told we could see
cigarette
25 packets, but they were never given to us to
look at for

1335
1 warning labels. They must have some sense they
get
2 exhibits earlier.
3 MR. LONG: I think that's when Mr.
LeBow had
4 the cigarette package Pat tried to offer them,
and you
5 said you would enter them at the end of the
case.

6 (Court adjourned.)

7 - - -

8 C E R T I F I C A T E

9 I, Richard G. DelMonico, Official
Court Reporter
10 in and for the United States District Court,
for the
11 Northern District of Ohio, Eastern Division,
do hereby
12 certify that the foregoing is a true and
correct transcript
13 of the proceedings herein.
14
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25

1336
and 1339. 1 (There no pages 1336, 1337. 1338.
No 2 charges have been made for these pages.)
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